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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 17

PARTMAR CORPORATION AND FANCHON AND MARCO, INC., PETITIONERS,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1953

CERTIORARI GRANTED MAY 25, 1953

No. 13113

United States Court of Appeals for the Ninth Circuit.

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division

Civil No. 6906-WM

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff for cause of action against defendants, and each of them, alleges as follows:

First Cause of Action

1. Plaintiff Paramount Pictures Theatres Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of New York, is a resident and citizen of the State of New York, and is duly qualified to do and is doing business in the State of California.

2. Defendant Partmar Corporation (hereinafter referred to as "Partmar") is a corporation duly organized and existing [2*] under and by virtue of the laws of the State of California and is a resident and citizen of the State of California.

3. Defendant Fanchon & Marco, Inc., (herein-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

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after referred to as "Guarantor") is a corporation duly organized and existing under and by virtue of the laws of the State of California and is a resident and citizen of the State of California.

4. The amount in controversy, exclusive of interest and costs, is in excess of the sum of $3,000.00.

5. A written lease was entered into, dated January 1, 1939, but was actually executed and delivered on August 30, 1939, between Paramount Pictures, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, which was and is a resident and citizen of the State of New York, being qualified to do and doing business in the State of California, as Lessor (hereinafter referred to as "Paramount Pictures") and defendant Partmar, as Lessee, of the theatre portion of the building known as the Paramount Theatre Building, located on the northeast corner of Sixth and Hill Streets in the City of Los Angeles, County of Los Angeles, State of California, the land upon which said building is erected being more particularly described as follows:

> Lots Six (6) and Seven (7) in Block Fourteen (14) of Ord's Survey, as per map thereof recorded in Book 53, at pages 66 et seq. Miscellaneous Records of said County of Los Angeles, excepting therefrom that portion of said lots being approximately the easterly ten (10) feet thereof that has been taken for alley purposes,

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together with all exits, entrances and appurtenant passageways and courtways and easements for light or air in connection [3] therewith; together with the furnishings, fixtures, personal property and equipment then contained or located in said portion of said building. Said lease was for a term commencing as of January 1, 1939, and ending on August 31, 1949, unless said term should be sooner terminated as therein set forth. Partmar covenanted thereby to pay to Paramount Pictures from and after August 31, 1939, the fixed weekly rental of $2,200.00 for each lease week, payable in advance on the first day of each and every said week, together with an additional sum equivalent to the excess, if any, over and above the aggregate amount of the fixed rent for each twelve-month period, of a sum equivalent to the total of 15 per cent of the gross receipts, as therein defined, during the portion of such twelve-month period as the theatre upon the demised premises is operated on a "straight picture policy" as therein defined, plus 12½ per cent of the said gross receipts during the portion of said twelve-month period as said theatre is operated on a "stage show policy."

Partmar thereby covenanted to use the demised premises solely and exclusively for the presentation of entertainment consisting either of a "straight picture policy" or a "stage show policy," as therein defined, and said lease particularly obligated Lessee to exhibit in the demised premises during the demised term the motion pictures released and distributed by Paramount Pictures, and licensed for

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exhibition therein pursuant to that certain franchise agreement, dated as of September 1, 1939, by and between Paramount Pictures and Partmar, hereinafter more particularly referred to.

6. Paramount Pictures is and has been for a period of time commencing long prior to the execution of said lease engaged in the business of producing motion pictures and, either directly [4] or through subsidiaries, of releasing and distributing motion pictures produced by itself or by others. The theatre portion of the Paramount Theatre Building, leased as aforesaid, was constructed, owned and operated by Paramount Pictures and its predecessors for the exclusive purpose and object of having a high class motion picture theatre with a large seating capacity centrally located in the City of Los Angeles for first run exhibitions of motion pictures released and distributed by Paramount Pictures, such theatre being commonly known in the motion picture industry as a "showcase" theatre for such pictures.

In the business of releasing and distributing motion pictures it is generally necessary for the profitable exploitation thereof that each picture so released and distributed be given its first general public showing in large high class motion picture theatres operated on a deluxe basis and centrally located in each of the larger metropolitan centers in the United States, including the City of Los Angeles. The Paramount Theatre is such a theatre. Such exhibition is a source of a substantial portion of the revenue derived from the production, release

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and distribution of motion pictures because such first-run exhibition generally commands higher admission prices than subsequent run exhibitions and therefore it is desirable that such first-run exhibition be had in theatres with large seating capacity and located, equipped and operated in such a manner as to attract the maximum number of patrons willing to pay such higher prices. Furthermore, the first-run exhibition of a motion picture is accomplished by extensive advertising and receives extensive publicity in metropolitan and other newspapers, in national magazines, in trade publications, by radio broadcasts and by other means of communication which induces in the general public a [5] desire to see such picture. As a result, motion picture exhibitors operating theatres in all parts of the area adjacent to such large cities within a radius of many miles are desirous of exhibiting such picture because of the public demand therefor created by such first-run exhibition and its attendant advertising and publicity. Unless such picture secures such first-run exhibition in such high class theatres in such large cities, it cannot be as readily sold to other exhibitors nor will the general public as readily attend exhibitions thereof. For that reason it is the custom and practice in the motion picture industry for the larger motion picture companies who produce, release and distribute pictures, to own or operate theatres in the larger cities in the United States, or by arrangements with other owners or operators, wherever possible, to otherwise secure a regular and permanent outlet for first-run exhibition in large, modern and centrally located

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theatres in said cities for the pictures released and distributed by said companies, such theatres thereby acting as a "showcase" for such pictures.

The exclusive purpose and object of the ownership and operation of the Paramount Theatre by Paramount Pictures and its predecessors above set forth and the reasons therefor was known to and fully understood by both Paramount Pictures and Partmar and was the basis upon which said lease to Partmar was made in conjunction with the franchise agreement contemporaneously and simultaneously executed as next hereinafter alleged.

In order to accomplish this purpose and object, Paramount Pictures and Partmar, concurrently with the execution and delivery of said lease, and on August 30, 1939, as of September 1, 1939, made and entered into a written agreement whereby Paramount Pictures granted to Partmar a film franchise for the said [6] Paramount Theatre for a term of ten years, commencing September 1, 1939, and ending August 31, 1949, whereby Partmar was granted a license to exhibit in the Paramount Theatre motion pictures and sound recordings thereof released and distributed by Paramount Pictures of specified classifications and numbers for each year of said ten-year term, and whereby Partmar covenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures for the periods, upon the terms and conditions, and for the royalties as therein provided, and whereby Partmar agreed to charge prices for admission to said theatre at rates therein specified,

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and to pay to Paramount Pictures license fees based upon gross receipts from said exhibitions at said theatre, as therein defined.

Said franchise agreement further provided that Partmar should exhibit in the Paramount Theatre pictures released and distributed by Paramount Pictures for a total of at least 46 out of each 52 weeks in each year of the term thereof, all in furtherance of the purpose and object thereof and to assure Paramount Pictures that all of the pictures released and distributed by it would be given first-run exhibition in the Paramount Theatre and thus receive the "showcase" presentation necessary for the profitable distribution thereof as hereinabove alleged.

In furtherance of said object and purpose said franchise agreement specifically provided that in the event the lease hereinabove referred to, executed and delivered simultaneously with said franchise agreement, should for any reason be cancelled or terminated, Paramount might at its option cancel and terminate said franchise agreement upon the mailing of written notice.

Likewise, in furtherance of said object and purpose of said lease and said franchise agreement as set forth above, said [7] lease provided in Article XXIX, Section 1(e) thereof, that if at any time during the period of said lease

> "that certain franchise agreement, dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised

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premises of motion pictures, generally released as 'Paramount Pictures' to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of the same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated, and the term hereby demised be brought to an end by lapse of time upon the third day thereafter as fully and completely as though that were the date in this lease distinctly fixed for the expiration of the demised term."

Said last-quoted provision of said lease was agreed upon and included in said lease in order to carry out the basic understanding of Paramount Pictures and Partmar that the continuance of the leasehold was entirely dependent upon the continuation of the franchise agreement whereby motion pictures produced by Paramount Pictures would be exhibited in the Paramount Theatre constructed and owned by Paramount Pictures and whereby in the event such franchise agreement was at an end and could not be further performed for any reason whatsoever, Paramount Pictures should have the absolute right and option to terminate the lease [8] on three (3) days' written notice and to have the immediate possession of the Paramount Theatre in

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order that it could continue itself to exhibit therein motion pictures released and distributed by itself; and this was the understanding and agreement of both parties to said lease.

7. Under date of September 1, 1942, an amendatory agreement was made and entered into between Paramount Pictures and Partmar whereby the term of said lease entered into as of January 1, 1939, and executed and delivered August 30, 1939, as hereinabove alleged, was extended to March 18, 1952, unless sooner terminated as therein and in said lease provided; and whereby Partmar covenanted to pay Paramount Pictures additional rent commencing September 1, 1942, and continuing during the remainder of said term as extended at the rate of 50 per cent of the net receipts from the operation of the demised premises, as the term net receipts is therein defined.

Likewise on September 1, 1942, Paramount Pictures and Partmar entered into an amendatory agreement extending to March 18, 1952, said franchise agreement, dated August 30, 1939, effective as of September 1, 1939, hereinabove referred to.

In Paragraph 5 of said agreement of September 1, 1942, extending and amending said lease, all references in Article XXIX, Section 1 of said lease to the franchise agreement, dated as of September 1, 1939, are specifically amended to provide that all such references shall thereafter apply to said franchanise agreement, dated as of September 1, 1939,

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as amended by the said agreement relating thereto, dated as of September 1, 1942.

8. Under date of September 29, 1944, Paramount Pictures made, executed and delivered to plaintiff a deed conveying the land hereinabove described and the building thereon known as [9] the Paramount Theatre Building. On the same date by written instrument Paramount Pictures assigned to plaintiff the lessor's interest and all rights thereunder in and to said lease, as amended, between Paramount Pictures and Partmar. Paramount Pictures owns 100 per cent of the stock of plaintiff, and plaintiff is a wholly owned subsidiary of Paramount Pictures.

9. On or about July 20, 1938, the United States of America filed suit in the United States District Court for the Southern District of New York against Paramount Pictures and others in that certain suit entitled "United States of America, Plaintiff, vs. Paramount Pictures, Inc., et al., defendants," being Equity No. 87-273, alleging violations by the defendants, including Paramount Pictures and its subsidiary corporations, of Sections 1 and 2 of an Act of Congress of July 20, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restrictions and Monopolies," commonly known as the Sherman Act. After certain intervening proceedings therein, a trial was had, evidence was received, the matter was submitted on briefs before a three-judge Expediting Court, and on June 11, 1946, said Court rendered its decision in said

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Equity No. 87-273 adjudicating, among other things, that all franchise agreements granted by Paramount Pictures and the other defendants therein, were, from their formation, and are an unlawful restraint of trade and were and are in violation of said Sherman Act. Thereafter and on December 31, 1946, said court made and filed in said action its Findings of Fact and Conclusions of Law wherein, among other things, it found that:

> ". . . franchises have been entered into by the distributor defendants [including therein Paramount Pictures] and unreasonably restrain trade because they cover too [10] long a period (more than one season) and also because they embrace all the features released by a given distributor,"

and wherein said court concluded that defendant Paramount Pictures, Inc., and others

> "have unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce in violation of the Sherman Act by,"

among other things, making franchises with its licensees and that the franchises so entered into have tended to restrain trade and that they violate Section 1 of the Sherman Act. Said Court thereupon entered its decree therein under date of December 31, 1946, effective April 1, 1947, perpetually enjoining Paramount Pictures,

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"from further performing any existing franchise to which it is a party and from making any franchises in the future. The term 'franchise' as used herein means a licensing agreement or series of licensing agreements entered into as a part of the same transaction in effect for more than one motion picture season and covering exhibitions of pictures released by one distributor during the entire period of agreement,"

and thereby perpetually enjoined Paramount Pictures from and after April 1, 1947, from performing the franchise between it and Partmar dated August 31, 1939, as of September 1, 1939, as amended, as hereinabove alleged.

10. Said court further adjudicated in its opinion dated June 11, 1946, in said Equity No. 87-273 that it was lawful and [11] proper and not in violation of any of the laws of the United States for Paramount Pictures or any other motion picture company to exhibit motion pictures released or distributed by it in a theatre owned by it or by its wholly-owned subsidiary and upon such terms as to admission prices and clearances and on such runs as such company may see fit.

Said court further in its Findings of Fact, hereinbefore referred to, found as a fact that:

"The successful exhibition of a feature in its initial runs in any area is widely publicized and closely observed by subsequent run exhibitors in that area and success in exploiting a picture in

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> such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors."

and that Paramount Pictures

> "is able to coordinate the original exhibition of its features in its theatres with an extensive and accurately timed national advertising campaign."

Said court further in its decree dated December 31, 1946, provided that nothing contained therein should be construed to limit in any way whatsoever the right of defendant Paramount Pictures to license or in any way to arrange or provide for the exhibition of any or all motion pictures which it might at any time distribute in such manner and upon such terms and subject to such conditions as may be satisfactory to it in any theatre in which Paramount Pictures had or might acquire pursuant to the terms of the decree, a proprietary interest of 95% or more, either directly or through subsidiaries.

The result of said decree in Equity No. 87-273 was:

> (1) To put an end to all further performance by [12] either Paramount Pictures or Partmar under said franchise and to terminate it once and for all;
>
> (2) Thereby to destroy the assurance to Paramount Pictures of a "showcase" for all pictures released and distributed by it so long

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as defendant Partmar remains in possession under said lease, by reason of the fact that said Partmar is no longer required to exhibit in said theatre all or any of the motion pictures released and distributed by Paramount Pictures as it had been so required under the terms of said franchise, and thus to destroy the purpose and object of the execution of the lease and franchise agreement as hereinabove alleged; and

(3) To authorize Paramount Pictures to exhibit motion pictures produced by it on such terms as it desires in a theatre or theatres owned by it, or by plaintiff as its wholly owned subsidiary. Neither Paramount Pictures. nor any of its subsidiaries, including plaintiff, owns or controls any theatre in the downtown section of Los Angeles, except its interest in the Paramount Theatre as hereinabove alleged.

The portions of said decree in said Equity No. 87-273 relating to the said franchise agreements, have, since on or about March 31, 1947, become and now are final.

11. Said franchise agreement dated as of September 1, 1939, as amended, between Paramount Pictures and Partmar, hereinabove referred to, provided in paragraph Twenty-second (c) that: [13]

"In case Paramount shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays

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licensed hereunder by reason of * * * order of any court of competent jurisdiction * * * or any other similar or dissimilar cause whatsoever beyond the control of Paramount, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages therefor are hereby waived by the Exhibitor [Lessee]. Such delay in or failure of performance shall not affect this agreement with respect of other photoplays licensed hereunder."

12. By reason of the foregoing, said franchise agreement dated August 31, 1939, as of September 1, 1939, between Paramount Pictures and defendant Partmar, as amended by said agreement dated September 1, 1942, as foresaid was terminated effective as of the close of business March 31, 1947. On March 26, 1947, Paramount Pictures duly notified Partmar in writing of said fact.

13. Pursuant to the provisions of Paragraph XXIX, Section 1 of said lease dated January 1, 1939, executed and delivered August 30, 1939, as hereinabove alleged, plaintiff exercised its option and gave Partmar a written notice dated April 2, 1947, stating that by reason thereof the term of such lease should cease and expire three days from the date of said notice. Said lease was thereupon terminated effective on or about April 5, 1947, and the term of said lease thereupon expired. Partmar failed to surrender up possession of said demised premises upon the expiration of said three days

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after receiving said notice [14] of April 2, 1947, as provided in Paragraph XXIX, Section 1 of said lease. Plaintiff thereupon, on April 7, 1947, delivered to Partmar a written Notice to Quit within three days after the date of said notice of April 7, 1947.

14. Defendant Partmar has failed and refused and does now fail and refuse to vacate and surrender possession of said demised premises to plaintiff, and said defendant has continued, and does now continue, wrongfully to withhold from plaintiff the possession thereof. Defendant Partmar has failed and refused to pay to plaintiff the rental fixed for said demises premises or the percentage of gross receipts and net receipts, as required by the terms of the lease in the event of termination of said lease, and there is now due and owing to plaintiff from said defendant as such rental and other sums due and owing under the terms of said lease a sum the amount of which is unknown to plaintiff by reason of the fact that the same can be determined in accordance with the terms of said lease only upon accounting had therefore as provided by said lease. Plaintiff has demanded from defendant Partmar such accounting but defendant Partmar has refused and now refuses to render such an accounting or to pay the sums shown to be due thereby. Further sums will accrue to plaintiff hereafter and until the entry of a final judgment herein for the wrongful withholding of said demised premises by defendant Partmar.

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Plaintiff has been further damaged by the wrongful withholding by said defendant in the sum of $200,000.

15. By the terms of Paragraph XXVIII of said lease, defendant Partmar covenanted and agreed to pay any and all reasonable or proper costs and expenses, including a reasonable attorneys' and counsel fee, that might at any time result from or arise out of, or that plaintiff may pay or incur in enforcing or [15] seeking to enforce any of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of said lease. Plaintiff has incurred costs and expenses, including attorneys' fees, and will incur further such expenses in the enforcement of its rights to recover possession of the demised premises. Plaintiff requests that the court determine the reasonable costs and expenses, including attorneys' fees, incurred and to be incurred by plaintiff in the bringing and maintaining of this proceeding through to final judgment.

16. Plaintiff has performed all covenants and conditions on its part required to be performed under and pursuant to the terms and provisions of said lease as amended.

Second Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as though expressly made a part hereof each and every allegation contained

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in Paragraphs 1 to 5, inclusive, of the First Cause of Action hereof.

2. Said lease provided in Article XXIX, Section 1(e) thereof that if at any time during the period of said lease

> "that certain franchise agreement, dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised premises of motion pictures, generally released as 'Paramount Pictures' to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days [16] from the date of the mailing of the same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated, and the term hereby demised be brought to an end by lapse of time upon the third day thereafter as fully and completely as though that were the date in this lease distinctly fixed for the expiration of the demised term."

3. Concurrently with the execution and delivery of said lease and on August 30, 1939, as of September 1, 1939, Paramount Pictures and Partmar made and entered into a written agreement whereby Paramount Pictures granted to Partmar a film franchise for the said Paramount Theatre for a

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term of ten years, commencing September 1, 1939, and ending August 31, 1949, whereby Partmar was granted a license to exhibit in the Paramount Theatre motion pictures and sound recordings thereof released and distributed by Paramount Pictures of specified classifications and numbers for each year of said ten-year term, and whereby Partmar covenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures for the periods, upon the terms and conditions, and for the royalties as therein provided.

4. Plaintiff by this express reference thereto now repeats and realleges herein as though expressly made a part hereof each and every allegation contained in Paragraphs 7, 8 and 9 of the First Cause of Action hereof.

5. Each and all of the provisions of said decree in said Equity No. 87-273 hereinabove in this cause of action alleged have since on or about March 31, 1947, become and now are final.

6. Plaintiff by this express reference thereto now [17] repeats and realleges as though expressly made a part hereof each and every allegation contained in Paragraphs 11 to 16, inclusive, of the First Cause of Action hereof.

Third Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as thought expressly made a part hereof, each and every allegation con-

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tained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof.

2. On September 1, 1942, as a part of said agreement extending the term of said lease to March 18, 1952, as hereinabove alleged, Paramount Pictures made a loan to Partmar in the sum of $28,000, evidenced by a promissory note executed by Partmar, payable in annual installments of $4,000 each, commencing August 31, 1943, and continuing to and including August 31, 1949, together with interest at the rate of 2% per annum from September 1, 1942; upon the condition, however, that said note shall be deemed fully matured and the entire unpaid balance of principal and accrued interest thereunder shall immediately become due and payable, among other things, in the event that said lease as amended shall cease and expire or be cancelled or terminated as provided in Article XXIX, Section 1 of said lease, as amended. The unpaid principal balance of said note on April 1, 1947, was the sum of $12,000, together with accrued unpaid interest thereunder at the rate of 2% per annum from September 1, 1946.

3. Said note dated September 1, 1942, executed by Partmar in favor of Paramount Pictures was by written instrument dated September 29, 1944, duly assigned by Paramount Pictures to plaintiff and plaintiff at all times since said date has [18] been and now is the owner and holder of said note and all rights and interests therein and thereunder.

4. By reason of the termination of said lease

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as amended as hereinabove alleged, the unpaid principal balance and interest under said note, to wit, the sum of $12,000 plus unpaid interest, is now due, owing and unpaid by defendant Partmar to plaintiff. No part of said sum of $12,000, plus interest thereon as aforesaid, has been paid to plaintiff by said defendant or by any one else.

Fourth Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein as though expressly made a part hereof, each and every allegation contained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof and Paragraphs 1 to 4, inclusive, of the Third Cause of Action hereof.

2. Defendant Fanchon & Marco owns 100% of the capital stock of defendant Partmar and the latter is a wholly-owned subsidiary of the former.

3. By written guaranty dated January 1, 1939, defendant Fanchon & Marco guaranteed to Paramount Pictures, its successors and assigns, performance of the lease to Partmar, with the limits of the guarantor's liability not to exceed the sum of $100,000. On January 18, 1943, effective as of September 1, 1942, defendant Fanchon & Marco executed and delivered to Paramount Pictures an agreement supplementing the last-mentioned guaranty to include a guaranty of performance of the lease as amended and the payment of the note dated September 1, 1942, executed by defendant Partmar and

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delivered to Paramount Pictures as hereinabove referred to. [19]

4. By written instrument dated September 29, 1944, Paramount Pictures assigned to plaintiff all rights of Paramount Pictures in and to said guaranty executed by defendant Fanchon & Marco under date of January 1, 1939, and its amendment of January 18, 1943, above referred to.

5. Defendant Fanchon & Marco has failed and refused, and does now fail and refuse to pay said rental, said costs and expenses, said attorneys' fees, the unpaid balance of principal and accrued interest on said note, or any other sums as provided in said lease, note and guaranty, or any part of any of said sums, either to Paramount Pictures or to plaintiff.

Fifth Cause of Action

1. Plaintiff by this express reference thereto repeats and realleges herein, as though expressly made a part hereof, each and every allegation contained in Paragraphs 1 to 16, inclusive, of the First Cause of Action hereof.

2. An actual controversy has arisen and now exists between plaintiff and defendants. Plaintiff claims and contends that said lease dated January 1, 1939, effective August 31, 1939, has been terminated, effective on or about April 5, 1947, and that since said last-mentioned date Partmar has been and is now wrongfully withholding possession of said Paramount Theatre. Defendants deny the forego-

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ing claims and contentions of plaintiff and claim and contend that said lease is in full force and effect.

Wherefore, plaintiff prays for judgment against defendants, and each of them, as follows:

1. Adjudicating and declaring that said lease dated January 1, 1939, effective August 31, 1939, as amended, was terminated [20] on or about April 5, 1947;

2. Adjudicating and declaring that defendant Partmar is and has been since on or about April 5, 1947, unlawfully and wrongfully withholding and continuing to withhold possession from plaintiff of said demised premises and that plaintiff is entitled to the immediate possession thereof;

3. Adjudicating and declaring that plaintiff is entitled to recover from defendants, and each of them, all sums due, owing and unpaid to plaintiff pursuant to the terms and provisions of said lease as amended, together with interest at the legal rate from the respective dates on which said sums became due, and for an accounting from defendants of all sums so owing under said lease as amended;

4. Adjudging that plaintiff recover from defendants, and each of them, treble damages in the sum of $600,000 for the unlawful and wrongful withholding of possession of said demised premises;

5. Adjudging that plaintiff recover from de-

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fendants, and each of them, the sum of $12,000, together with interest thereon at the rate of 2% per annum from September 1, 1946;

6. Adjudging that plaintiff recover from defendants, and each of them, its costs and expenses, including reasonable attorneys' fees, incurred in the bringing and maintenance of this action through to final judgment, and for the court to adjudicate the reasonable amount of such costs, expenses and attorneys' fees to which plaintiff is entitled under the terms of said lease as amended; and [21]

7. For such other and further relief as to the court may seem proper.

O'MELVENY & MYERS,
WM. B. CARMAN, JR.,
THOMAS O. McCRANEY,
RODNEY K. POTTER,
JACKSON W. CHANCE,

By /s/ W. B. CARMAN, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. [22]

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In the District Court of the United States for the Southern District of California, Central Division

Civil No. 6906—WM

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants.

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, and FANCHON & MARCO, INC., a Corporation,

Defendants and
Third-Party Plaintiffs,

vs.

PARAMOUNT PICTURES, INC.; PARAMOUNT FILM DISTRIBUTING CORPORATION, LEONARD GOLDENSON, CHARLES REAGAN, SAM DEMBOW, JR., ADOLPH ZUKOR, BARNEY BALABAN and Y. FRANK FREEMAN,

Third-Party Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANTS PARTMAR CORPORATION,

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A CORPORATION, AND FANCHON & MARCO, INC., A CORPORATION, TO PLAINTIFF'S COMPLAINT

First Defense

1. The complaint fails to state any claim on which relief can be granted.

Second Defense

2. The United States of America is a necessary party to this action, because the relief prayed for by the plaintiff will defeat the right of the United States of America to the relief sought in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and to the relief granted in a judgment entered in that case on December 31, 1946.

Third Defense

3. The defendants admit the allegations of paragraphs 2, 3, 4, 5, 7, 9 and 11. Deny the allegations of paragraphs 6, 10, 12, 13, 14, 15 and 16. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1 and 8.

As to the Second Cause of Action

4. In answer to paragraphs 1, 4 and 6 of plaintiff's second cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

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5. These defendants admit the allegations of paragraphs 2 and 3, and deny the allegations of paragraph 5.

As to the Third Cause of Action

6. In answer to paragraph 1 of plaintiff's third cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

7. Admit the allegations of paragraph 2, except insofar as said paragraph is denied by the defendants' counterclaim and deny the allegations of paragraph 4. The defendants are without knowledge or information sufficient to form a belief as to the truth of the [38] allegations contained in paragraph 3.

As to the Fourth Cause of Action

8. In answer to paragraph 1 of plaintiff's fourth cause of action, these defendants make the same answers to those paragraphs realleged as made to the first and third causes of action.

9. These defendants admit the allegations of paragraphs 2, 3 and 5, but deny that there is any sum due from Fanchon & Marco to the plaintiff for rental, costs, expenses, attorneys' fees, unpaid balance of principal or accrued interest on said note, or any other sums as provided in said lease, or otherwise. These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

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As to the Fifth Cause of Action

10. In answer to paragraph 1 of plaintiff's fifth cause of action, these defendants make the same answers to those paragraphs realleged as made to the first cause of action.

11. Admit the allegations of paragraph 2.

Fourth Defense

12. Paramount Pictures Theatres Corporation, Paramount Pictures, Inc.; Paramount Film Distributing Corporation, Leonard Goldenson, Charles Reagan, Sam Dembow, Jr., Adolph Zukor, Barney Balaban and Y. Frank Freeman (hereinafter called third-party defendants), and the defendants in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the distribution and exhibition of motion pictures, in violation of the Act of Congress of July 2, 1890; entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and [39] Monopolies"; that is to say, the same conspiracy stated in the complaint in that case.

13. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures Distributing Company and Paramount Pictures, Inc., entered into contracts with Partmar

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Corporation granting to Partmar Corporation licenses to exhibit at the Paramount Theatre, Los Angeles, California, photoplays made and released by Paramount Pictures, Inc., and Paramount Film Distributing Corporation, from March 2, 1933, to March 18, 1952. These contracts will be hereinafter called film franchises.

14. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures, Inc., entered into contracts with the defendants leasing the Paramount Theatre to Partmar Corporation, from March 2, 1933, to March 18, 1952.

15. From March 2, 1933, to the present time Partmar Corporation has been receiving photoplays from Paramount Pictures, Inc., and Paramount Film Distributing Corporation for exhibition at the Paramount Theatre; has been in possession of the Paramount Theatre; and has been there engaged in the business of exhibiting photoplays.

16. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants, arranged and agreed among themselves, to include in the leases a statement to the effect that if, prior to March 18, 1952, the film franchises should be terminated, the lessor should have an option to terminate the lease, dispossess Partmar Corporation and recover possession of the Paramount Theatre. They further arranged and agreed to use that statement for the purpose of dispossessing Partmar Corporation and recovering possession of the Paramount

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Theatre, if performance of any of the film franchises should be enjoined because of the aforesaid conspiracy.

17. This action has been brought by the plaintiff in [40] pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, was instituted.

18. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants, arranged and agreed among themselves, to require Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from the Paramount Theatre. The plaintiff and the third-party defendants have continuously and fully enforced the exclusive licensing requirement, except that other photoplays have been licensed for exhibition at the Paramount Theatre at the request and with the consent of the plaintiff.

19. Because of the exclusive licensing requirement, and the conspiracy, arrangements and agreements aforesaid, the plaintiff and the third-party defendants, have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges for the photoplays made and released by them and exhibited at

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the Paramount Theatre, from March 2, 1933, to the present time.

20. Said terms, conditions and charges have exceeded fair, reasonable and lawful terms, conditions and charges in a large amount, to wit, $500,000.

Fifth Defense

21. The defendants reincorporate and reallege in their fifth defense paragraphs 12 to 15 of their fourth defense, the same as though specifically repleaded and realleged herein.

22. The term stipulated in the lease of August 30, 1939, was for ten years and to terminate on August 31, 1949. Fixed weekly [41] amounts or specified percentages of the gross receipts of Partmar Corporation at the Paramount Theatre, whichever should be the greater sums, were stipulated in the lease to be paid by Partmar Corporation during the full term of the lease. On or about May 1, 1942, the plaintiff and the third-party defendants arranged and agreed among themselves, to compel Partmar Corporation to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre.

23. The plaintiff and the third-party defendants arranged and agreed to refuse to furnish photoplays to Partmar Corporation for exhibition at the Paramount Theatre, and to attempt to evict Partmar Corporation from the Paramount Theatre, unless Partmar Corporation should pay in addition

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to the rental stated in the lease fifty per cent of the net receipts of the operation of the theatre.

24. The plaintiff thereupon demanded that Partmar Corporation pay to it, in addition to the rental stipulated in the lease, fifty per cent of the net receipts of the operation of the theatre, as a consideration for continuing to furnish photoplays necessary for the continued operation of the Paramount Theatre, and for continued performance by the plaintiff of the lease and forebearance by it from instituting and maintaining actions to evict Partmar Corporation from the Paramount Theatre.

25. For the purpose of procuring the continued furnishing of photoplays for the operation of the Paramount Theatre, and for the purpose of procuring the forebearance by plaintiff and the third-party defendants from the breaches of contract, as aforesaid, Partmar Corporation has made periodical payments of fifty per cent of the net receipts of the operation of the Paramount Theatre. Said payments have amounted to approximately $600,000, as of March 31, 1947. Unless this action shall be dismissed and the plaintiff enjoined as hereinafter prayed, future payments of fifty per cent of [42] the net receipts of the operation of the theatre will increase this amount to approximately $1,000,000.

Sixth Defense

26. That under the terms of Article II of that said lease made and executed by and between Paramount Pictures, Inc., as lessor and Partmar Cor-

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poration as lessee, dated January 1, 1939, executed and delivered on the 30th day of August, 1939, and by Article IIa of the extension of said lease made and executed between the said parties on the 1st day of September, 1942, the defendant, Partmar Corporation, caused an audit to be made by a certified public accountant to determine the deductions allowable to this defendant under the provisions of this lease for the purpose of determining rental in accordance therewith; that lessor expressed its dissatisfaction concerning said audit, and pursuant to the right of the lessor under the terms of the lease, the plaintiff caused an independent audit to be made, which was not mutually agreeable to the parties. That in accordance with the terms of said lease, and the amendment thereto as hereinabove alleged, an audit was made by Messrs. Price Waterhouse & Company and under said audit the amount of the percentage rent was ascertained in accordance with the method prescribed in said lease. That in accordance with the terms of said lease the audit made by Messrs. Price Waterhouse & Company was to be used as the basis for determining the amount of the percentage rent. That according to the audit prepared by Messrs. Price Waterhouse & Company there was an overpayment of rent for the years 1944-45 made to the plaintiff on behalf of this defendant in the sum of $10,666.71. That according to the determination of said audit by Messrs. Price Waterhouse & Company for the year 1945-46 there was shown to be an overpayment of rent made by defendant Partmar to the plaintiff in the sum of

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$24,250.86. That in determining the amount of gross receipts for the purpose of arriving at the rent figure for [43] the year 1946-47, as provided in said lease, this defendant used the accounting methods which had been employed by Messrs. Price Waterhouse & Company in the preparation of their audit for the years 1944-45 and 1945-46, and there was found that at the close of the books for the quarter ending March 31, 1947, that there had been an overpayment of rent by this defendant to the plaintiff in the sum of $12,955.71. That demand has been made by this defendant upon plaintiff for the repayment of said sums as hereinabove alleged, but that the plaintiff has failed and refused to make such payments and there is now due, owing and unpaid to this defendant from the plaintiff, the sum of $47,873.28.

First Counterclaim

27. Paramount Pictures Theatres Corporation, Paramount Pictures, Inc., Paramount Film Distributing Corporation, Leonard Goldenson, Charles Reagan, Sam Dembow, Jr., Adolph Zukor, Barney Balaban and Y. Frank Freeman, and the defendants in United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, in the United States District Court for the Southern District of New York, and other persons to the defendants unknown, were, at the time of the acts and transactions stated in the complaint herein, and they now are, engaged in a conspiracy in restraint of trade and commerce among the States, in the dis-

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tribution and exhibition of motion pictures, in violation of the Act of July 2, 1890, that is to say, the same conspiracy stated in the complaint in that case.

28. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures Distributing Company and Paramount Pictures, Inc., entered into contracts with Partmar Corporation granting to Partmar Corporation licenses to exhibit at the Paramount Theatre, Los Angeles, California, photoplays made and released by Paramount Pictures, Inc., and Paramount Film Distributing Corporation, from March 2, 1933, to March 18, 1952. [44] These contracts will be hereinafter called film franchises.

29. On or about March 2, 1933; August 7, 1934; August 30, 1939, and January 18, 1943, Paramount Pictures, Inc., entered into contracts with the defendants leasing the Paramount Theatre to Partmar Corporation, from March 2, 1933, to March 18, 1952.

30. From March 2, 1933, to the present time Partmar Corporation has been receiving photoplays from Paramount Pictures, Inc., and Paramount Film Distributing Corporation, for exhibition at the Paramount Theatre; has been in possession of the Paramount Theatre; and has been there engaged in the business of exhibiting photoplays.

31. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged

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and agreed among themselves, to include in the leases a statement to the effect that if, prior to March 18, 1952, the film franchises should be terminated, the lessor should have an option to terminate the lease, dispossess Partmar Corporation and recover possession of the Paramount Theatre. They further arranged and agreed to use that statement for the purpose of dispossessing Partmar Corporation and recovering possession of the Paramount Theatre, if performance of any of the film franchises should be enjoined because of the aforesaid conspiracy.

32. This action has been brought by the plaintiff in pursuance of the aforesaid conspiracy, arrangements and agreements, and to evade and defeat the purpose to end the aforesaid conspiracy and restraint of trade for which United States of America v. Paramount Pictures, Inc., et al., Equity No. 87-273, was instituted.

33. As part of the aforesaid conspiracy, the plaintiff and the third-party defendants arranged and agreed among themselves, to require Partmar Corporation to license for exhibition at the Paramount Theatre for 46 weeks of each year, only photoplays made and released by Paramount Pictures, Inc., and, for any failure upon the part of Partmar Corporation to obey that requirement, to evict it from Paramount Theatre. The plaintiff, and the third-party defendants [45] have been able to impose, and they have in fact imposed, upon Partmar Corporation, excessive terms, conditions and charges

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for the photoplays made and released by them and exhibited at the Paramount Theatre, from March 2, 1933, to the present time.

34. Said terms, conditions and charges have exceeded fair, reasonable and lawful terms, conditions and charges in a large amount, to wit, $1,250,000. The defendants have been injured and damaged in their business and property by the acts and transactions aforesaid in the sum of $1,250,000.

Second Counterclaim

35. The defendants reincorporate and reallege in their second counterclaim paragraphs 27 to 30 of their first counterclaim the same as though specifically repleaded and realleged herein.

36. The term stipulated in the lease of August 30, 1939, was for ten years and to terminate on August 31, 1949. Fixed weekly amounts or specified percentages of the gross receipts of Partmar Corporation at the Paramount Theatre, if the percentages should be greater than the fixed weekly amounts, to be paid by Partmar Corporation during the full term of the lease, were agreed to in the lease. On or about May 1, 1942, the plaintiff and the third-party defendants arranged and agreed among themselves, to compel Partmar Corporation to pay an additional sum; that is to say, fifty per cent of the net receipts of Partmar Corporation at the Paramount Theatre.

37. The plaintiff and the third-party defendants arranged and agreed to refuse to furnish pho-

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toplays to Partmar Corporation for exhibition at the Paramount Theatre, and to attempt to evict Partmar Corporation from the Paramount Theatre, unless Partmar Corporation should pay, in addition to the rental stated in the lease, fifty per cent of the net receipts of the operation of the theatre.

38. The plaintiff thereupon demanded that Partmar Corporation pay to it, in addition to the rental stipulated in the lease, [46] fifty per cent of the net receipts of the operation of the theatre, as a consideration for continuing to furnish photoplays necessary for the continued operation of the Paramount Theatre, for continued performance by the plaintiff of the lease and forebearance by it from instituting and maintaining actions to evict Partmar Corporation from the Paramount Theatre.

39. For the purpose of procuring the continued furnishing of photoplays, for the operation of the Paramount Theatre, and for the purpose of procuring the forebearance by plaintiff and the third-party defendants from the breaches of contract, as aforesaid, Partmar Corporation has made periodical payments of fifty per cent of the net receipts of the operation of the Paramount Theatre. Said payments have amounted to approximately $600,000, as of March 31, 1947. Unless this action shall be dismissed and the plaintiff enjoined as hereinafter prayed, future payments of fifty per cent of the net receipts of the operation of the theatre will increase this amount to approximately $1,000,000. The defendants have been injured and damaged in their

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business and property by the acts and transactions aforesaid in the sum of $1,000,000.

Third Counterclaim

40. That under the terms of Article II of that said lease made and executed by and between Paramount Pictures, Inc., as lessor and Partmar Corporation as lessee, dated January 1, 1939, executed and delivered on the 30th day of August, 1939, and by Article IIa of the extension of said lease made and executed between the said parties on the 1st day of September, 1942, the defendant, Partmar Corporation, caused an audit to be made by a certified public accountant to determine the deductions allowable to this defendant under the provisions of this lease for the purpose of determining rental in accordance therewith; that lessor expressed its dissatisfaction concerning said audit, and pursuant to the right of the lessor under the terms of the lease, the plaintiff caused an independent [47] audit to be made, which was not mutually agreeable between the parties. That in accordance with the terms of said lease, and the amendment thereto as hereinabove alleged, an audit was made by Messrs. Price Waterhouse & Company and under said audit the amount of the percentage rent was ascertained in accordance with the method prescribed in said lease. That in accordance with the terms of said lease the audit made by Messrs. Price Waterhouse & Company was to be used as the basis for determining the amount of the percentage rent. That according to the audit

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prepared by Messrs. Price Waterhouse & Company there was an overpayment of rent made to the plaintiff on behalf of this defendant in the sum of $10,666.71. That according to the determination of said audit by Messrs. Price Waterhouse & Company for the year 1945-46 there was shown to be an overpayment of rent made by this defendant to the plaintiff in the sum of $24,250.86. That in determining the amount of gross receipts for the purpose of arriving at the rent figure for the year 1946-47, as provided in said lease, this defendant used the accounting methods which had been employed by Messrs. Price Waterhouse & Company in the preparation of their audit for the years 1944-45 and 1945-46, and there was found that at the close of the books for the quarter ending March 31, 1947, that there had been an overpayment of rent by this defendant to the plaintiff in the sum of $12,955.71. That demand has been made by this defendant upon plaintiff for the repayment of said sums as hereinabove alleged, but that the plaintiff has failed and refused to make such payments and there is now due, owing and unpaid to this defendant from the plaintiff, the sum of $47,873.28, and that further sums for overpayment of rent will accrue subsequent to March 31, 1947.

Wherefore, the defendants pray:

1. That the complaint be dismissed.

2. That the persons and corporations named in paragraph 1 of the fourth defense, be summoned to appear herein as third-party [48] defendants, and

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make such defenses as they may have to the counterclaims stated herein.

3. That the amount of $47,872.28 and such further sums as have accrued subsequent to March 31, 1947, be set off against any claim of any notes or other obligation which the plaintiff may have against the defendants.

4. That the defendants have judgment for damages under their first counterclaim in the sum of $3,750,000 with interest, costs and a reasonable attorneys' fee.

5. That defendants have judgment for damages under their second counterclaim in the sum of $3,000,000, with interest, costs and a reasonable attorneys' fee.

6. That the defendants have judgment for the amount claimed in their third counterclaim, to wit, in the total amount of $47,873.28, and such further sums as have accrued subsequent to March 31, 1947, with interest.

7. That the plaintiff be enjoined from further collection and receipt of fifty per cent of the net receipts of the operation of the Paramount Theatre.

8. That the plaintiff and the third-party defendants be enjoined from further engaging in the conspiracy in restraint of trade and commerce among the States in the distribution and exhibition of motion pictures, and from engaging in any acts and transactions in pursuance thereof relative to or

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injurious to the defendants in their business and property, and in the operation of the Paramount Theatre.

9. That the defendants be granted such other and further relief as may be necessary and appropriate.

MACFARLANE, SCHAEFER
& HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,

By /s/ HENRY SCHAEFER, JR.,
Attorneys for Defendants and
Third-Party Plaintiffs.

RUSSELL HARDY,
Of Counsel.

[Endorsed]: Filed July 10, 1947. [49]

[Title of District Court and Cause.]

ORDER

Plaintiff's motion for separate trials, defendants' motion for continuance of pretrial hearing, defendants' motion to produce, and pretrial hearing in the above-entitled matter came on [122] for hearing on April 26, 1948; the motions were argued by respective counsel; the pretrial hearing was conducted; and good cause appearing therefor;

It Is Ordered as follows:

1. Plaintiff's motion for separate trials is hereby

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granted and trial of the first, second and fifth causes of action set forth in the complaint on file herein is hereby set for July 6, 1948, at 10:00 o'clock a.m.; trial of the issue of damages for defendants' alleged wrongful withholding to follow the trial of said first, second and fifth causes of action; and the trial of defendants' counterclaims to follow said prior trials.

2. Defendants' motion to continue the pretrial hearing is hereby denied; but further pretrial hearing is hereby ordered for June 7, 1948, at 10:00 o'clock a.m.;

3. Defendants' motion to produce documents is hereby continued for further hearing on June 7, 1948, at 10:00 o'clock a.m.

Done in Open Court April 26, 1948.

/s/ WM. C. MATHES,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1948. [123]

[Title of District Court and Cause.]

BRIEF FOR DEFENDANTS

The Franchise Does Not Violate the Sherman Act

Prior to the decision of the Supreme Court reversing the judgment of December 31, 1946, the position of the plaintiff was that the franchise had

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been terminated by that injunction, and that the only question for decision was simply whether the injunction applied to the franchise. After the reversal of that judgment, the plaintiff took the position that the question presented was whether the franchise was violative of the Sherman Act, wholly apart from any judgment or the decisions of the District and Supreme Courts. We believe this case was not dismissed after the reversal of the judgment on which it was based, because the Court agreed with the plaintiff.

In a word, the plaintiff contends that the legality of the franchise is to be decided as if the government case had never existed, and that the only significance of the decisions of the District and Supreme Courts, is as precedents in a different but similar case.

Plaintiff has variously stated the position as follows: "Your Honor must independently determine whether the Act of Congress rendered such an agreement as this illegal" (Transcript, April 26, 1948, p. 13). "The legality or illegality of said franchise agreement must be determined by Your Honor in this action" (Memorandum in Opposition to Defendants' Motion for Summary Judgment, p. 2); "this Court must determine the inherent validity or invalidity of the Paramount-Partmar franchise, wholly apart from the decree in the Government Case" (Plaintiff's Reply to Brief for Defendants on Motions for Summary Judgment, p. 1); and apart from the formal decree,

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apart from any adjudication, the franchise is illegal (T. 154). According to the plaintiff, this Court must decide this case by "an independent process of reasoning influenced primarily by the opinion of the Supreme Court" (Plaintiff's Trial Memorandum, p. 24), but as if Paramount had not been a party to the Government suit, and as if this particular franchise, and the clearance and admission price and [287] other provisions, had not been involved.

In proceedings in this case prior to the trial, this Court has stated its view of the significance of the government case as follows: "merely a precedent," a "mere declaration of law" by the New York Court (Transcript, September 8, 1947, p. 130); "I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here," and "But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else * * *" (Transcript, June 7, 1948, p. 3).

If this be the correct view of the Paramount case, this suit involves an original de novo action under the Sherman Act, and the burden is upon the plaintiff to plead and prove every essential element of such an action, including conspiracy and monopolization, the existence of trade and commerce among the several States, the application of the conspiracy or monopolization to that trade, and un-

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reasonable restraint thereof. We wish to note that we do not consider the Paramount Case by any means a mere precedent.

No interstate commerce has been alleged or proved. Allegation and proof of the existence of the commerce restrained, is an essential element. In a direct action under the anti-trust laws, to recover treble damages or injunction, allegation and proof of interstate commerce is essential for two reasons: (1) to support the jurisdiction of the federal court, and (2) as the subject matter of the action, as that which has been restrained or monopolized. We do not contend that it was necessary for plaintiff to establish interstate commerce for the first reason, the jurisdiction of the court being based on diversity of citizenship. We do contend, however, that no violation of the statute can be shown without proof of interstate commerce in all respects as if the action were brought directly under the Sherman Act for the relief granted by that [288] act.

The existence of no commerce at all has been shown in this case. Indeed, the plaintiff has not even attempted to do so. Inferentially, there is indicated commerce in licensing motion pictures between Paramount and Partmar and other exhibitors located in the City of Los Angeles and the metropolitan area, all parts of which are within California. There is no indication of the movement of anything across state lines into or from California. If it is permissible to draw any conclusion from the

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evidence, it is that the pictures have been made in the City of Los Angeles, and that the films have been moved merely from one place in the city to theatres in the city and nearby places.

We have been unable to find any decided case in which parties have had the termerity to urge a court they were not required to allege and prove the existence of trade and commerce of some character, local, intrastate or interstate case. In the decided cases, allegation and evidence of some commerce has invariably been present, and the questions have been whether the commerce was interstate in character, whether the evidence was sufficient, etc. As stated in Peto v. Howell, 101 F. 2d 353 CCA 7, 1939:

> "Monopolies, as such, the federal government has no control over; only when a monopoly of some part of interstate commerce is involved does jurisdiction attach to the federal government. Consequently, it must be that Congress, in speaking of monopolies of any part of interstate commerce, must have had in mind such restraints of such part of that commerce as bring about an extraordinary control of any part of the commodities in the stream of commerce." (P. 359.)

> "the trade or commerce restrained or monopolized or attempted to be monopolized must be interstate or international. The statute expressly so says, and, whatever its phraseology, it must be so construed if it is to stand, [289]

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since it is only such trade and commerce that congress has authority to regulate * * *"

Dueber Watch Co. v. Howard Watch Co.,
55 F. 851; 66 F. 637, CCA 2, 1895.

"It should therefore appear directly, and not by way of inference, that the acts of the defendants, or their attempts to monopolize interstate commerce, resulted in its restraint or monopoly."

Ibid. 66 F. 646.

"It must appear that any injury to plaintiff was caused by interference with his interstate business."

Holland v. Majestic Radio Corp.,
27 F. Supp. 990.

"commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."

Swift v. U. S.,
196 U. S. 375, 399;

Lemke v. Farmers' Grain Co.,
258 U. S. 50;

United States v. Yellow Cab Co.,
332 U. S. 218.

The motion picture business in the City of Los Angeles and nearby areas is not interstate commerce, in the absence of evidence to the contrary.

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Binderup v. Pathe Exchange,
263 U. S. 291, 301-303;

Swift & Co. v. United States,
196 U. S. 375, 397;

Blumenstock v. Curtis Pub. Co.,
252 U. S. 436.

"It would be an extravagant consequence to draw from Hanley v. Kansas City Southern Ry., 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman Act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points."

Cincinnati Packet Co. v. Bay,
200 U. S. 179, 183;

United States v. Crescent Amusement Co.,
323 U. S. 173. [290]

"It seems clear that we have nothing more than a local price cutting war having no effect or impact upon interstate commerce and placing no burden upon the same."

Moore v. Mead,
184 F. 2d 338 CA 10, 1950;

KVOS v. Associated Press,
299 U. S. 269, 277;

The Wiswall v. Scott,
86 F. 671 CCA 2, 1898;

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Spencer v. Sun Oil Co.,
94 F. Supp. 408 DC, 1950.

There was no allegation or proof of conspiracy. There being no showing of interstate commerce, it is immaterial whether there was conspiracy, unreasonable clearance, fixed admission prices, block booking, or unreasonable restraint. In the absence of interstate commerce, all else was entirely beyond the purview of the Sherman Act. But, assuming that there had been no failure to prove interstate commerce, the absence of conspiracy is equally fatal. Probably the only evidence relative to conspiracy was the statement of Y. Frank Freeman, a witness for Paramount, that there were no conspiratorial arrangements between Paramount and Fox West Coast. (T. 2369-2370, 2390, 2395.)

Even in a setting of conspiracy, it is doubtful that the franchise would be unlawful. In the Paramount Case, franchises were attacked as one of many parts of a conspiracy in restraint of trade, and the Supreme Court considered franchises in the atmosphere and environment of unlawful conspiracy. But that Court said, and the reference applied to this identical franchise, "we cannot say on this record that franchises are illegal" (334 U. S. 156). It appears, therefore, that the Court did not consider that the rule in anti-trust cases that the vice is in the combination and that the unlawful plan makes the parts unlawful, tainted the franchises. The effect of the opinion seems to be that franchises are not unlawful per se, that is, apart

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from conspiracy, and that on the record in that case they were not shown to have been parts of the conspiracy. [291]

The Supreme Court, while probably not approving, clearly refrained from condemning franchises, whether with defendants, non-defendants or circuits. As to the effect of franchises, the Court referred to mere probabilities, as that franchises between defendants "might" be used to restrain trade, that franchises "may have been" used to discriminate against independents, and that franchises often contained discriminatory clauses in favor of defendants and large circuits. The cloud in which franchises reached the Supreme Court and in which they were returned by it to the trial court for clarification, has never been dispelled by that Court, at least so far as the Paramount franchises were concerned. The District Court has not thereafter considered, found or concluded that the effect of the Partmar or any other Paramount franchise was to discriminate against anyone. The consent judgment of March 4, 1949, obviated and denied that.

The Supreme Court seems at least to have clearly indicated that a franchise with one exhibitor for one theatre, like that with Partmar, was not involved in the case. It said in effect that only franchises with defendants and franchises for theatres in a circuit were involved.

In United States v. Reading Co., 226 U. S. 324, the Supreme Court said that lawful acts became vio-

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lative of the anti-trust laws only because of combination and conspiracy, as follows:

> "But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other States, and adopted as a means for that purpose the Temple Company, and through it, the control of the great Simpson & Watkins collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination under the federal statute * * * The evil is in the combination." (Pp. 353-354.) [292]

In Swift & Co. v. United States, 196 U. S. 396, the court referred to the necessity of conspiracy as follows:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful." (P. 396.)

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Binderup v. Pathe Exchange, 263 U. S. 291, 312:

> "each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See United States v. Schrader's Son, Inc., 252 U. S. 85, 99; Bobbs-Merrill Co. v. Straus, 139 Fed. 155, 191.

United States v. Crescent Amusement Co., 323 U. S. 173, 184:

> "We may assume that if a single exhibitor launched such a plan of economic warfare he would not run afoul of the Sherman Act. But the vice of the undertaking was the combination of several exhibitors in a plan of concerted action."

Ball v. Paramount,
169 F. 2d 317, 319.

To the same effect:

American Tobacco Co. v. United States,
328 U. S. 781, 810, 1946; [293]

United States v. Bausch & Lomb,
321 U. S. 707, 723;

Westway Theatre v. Fox,
30 F. Supp. 830, 835:

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"Thus where the clearances are established as a result of combination or conspiracy of numerous distributors or exhibitors or both, they have been held invalid. Youngclaus v. Omaha Film Board of Trade, D. C., 60 F. 2d 538. See also First Nat. Pictures, Inc., v. Robison, 9 Cir., 72 F. 2d 37; Vitagraph, Inc., v. Perelman, 3 Cir., 95 F. 2d 142. But where the clearance results only from private contract between a distributor and an exhibitor, without unusual features, the provision has been upheld. Rolsky v. Fox Mid West Theatres, supra. See also Peoples Film Co. v. Minneapolis Film Board of Trade, D. C. Minn., 1936, and provision of consent decree in United States v. Balaban & Katz, D. C. N. D. Ill., 1932, Vol. 7, Fordham Law Rev., p. 199; Vol. 36, Columbia Law Rev., p. 646.

To the same effect:

Carter-Crume v. Peurrung,
86 F. 439;

Federal Trade Commission v. Gratz,
253 U. S. 421, 428-429;

United States v. Colgate,
250 U. S. 300;

United States v. Schrader,
252 U. S. 85 [294]

The Sherman Act has no application to the admission price agreement on the evidence in this case. In the absence of interstate commerce and

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conspiracy, the agreement on admission prices is perfectly lawful. Wholly apart from the government case against Paramount, as postulated by the plaintiff, the action on admission prices was permissible. The evidence in this case shows at most nothing more than one agreement on admission prices between one film company and one exhibitor applicable to one theatre. What the prices were at other theatres in the same area at the same time, is not shown. Whether the prices were established and applied pursuant to any contact and agreement among the other film companies and the other theatres, is not shown. None of the pleadings, evidence, findings and conclusions in the government case relative to admission prices, were offered and received in this case. In fact, it was argued by Paramount and ruled by the Court in this case (probably correctly), "that the rule of law is that the evidence, the documents, the pleadings in a government equity suit are not admissible under section 5 of the Clayton Act or otherwise, in a private action between other parties" (T. 2156, 2192).

There is no evidence in this case of the facts found in the government case as to admission prices; that is, there is no evidence that the film companies, including Paramount, had agreed with all licensees upon minimum admission prices, that the prices were in general uniform, nor that the licenses were in effect price fixing arrangements among all of the film companies, nor that there was a "system" of determining minimum admission prices in all theatres where feature motion pictures were exhib-

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ited, nor that the film companies conspired among themselves to maintain a nation-wide system of fixed admission prices. (70 F. Supp. 60, 61, 72, findings 62-65, 70, 72.) [295]

The admission price provisions applied only to part of the business of the theatre. It applied only to the exhibition of Paramount pictures, which, from 1939 to 1946 were used during 76 per cent of the playing time, and were 83.5 per cent of the pictures used. In other words, 14 per cent of the playing time and 16.5 per cent of the pictures were not within the price provisions.

The provision had no application to prices for children, which represented approximately ten per cent of the total admission receipts. It was disregarded by Partmar as to Patrons in the armed services, all or most of whom were adults. (Pl. Ex. 114.)

A single contract between one film company and one exhibitor, is not violative of the Sherman Act. While a system of contracts between one vendor and many vendees, and applying to a large trade in its entirety, as to the price at which a commodity is to be resold (to which the system of admission prices is analogous), may be violative of the anti-trust laws, in no reported case that we can find, has it been ruled that a single such contract is not permissible.

In Park v. Hartman, 153 F. 24 CCA 6, 1907, the Court distinguished a system of resale price con-

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tracts between one vendor and many vendees, and a single contract between one vendor and one vendee, as follows:

> "Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law" (p. 37). [296]

In United States v. Colgate, 250 U.S. 300, a system of resale price fixing, contracts applicable to a large trade, on a nation wide scale, and to many vendees, was upheld, where the vendor had merely suggested the prices and refused to deal with those who ignored the suggestion, although the suggestion was wholly effective, saying "In the absence of any purpose to create or maintain a monopoly the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (p. 307)

In United States v. General Electric Co., 272 U.S. 476, 489, a single contract requiring a licensee under a patent to make sales of the patented article at prices named by the licensor, was upheld as not obnoxious to the Sherman Act.

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In the Paramount Case the trial court distinguished a system of admission prices fixed by conspiracy, from a single license controlling admission prices. It said:

> "But that act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices . . . nor need we now decide whether a copyright owner may lawfully fix admission prices to be charged by a single independent exhibitor for the exhibition of its film, if other licensors and exhibitors are not in contemplation. (United States v. Paramount, 66 F. Supp. 340.)

In United States v. Paramount, 334 U.S. 131, 143, 144, the Court dealt, not with a single contract on admission prices, but with a system of such contracts to "regiment an entire industry" on admission prices. As to a single contract, it said "The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic." On the evidence in this case, however, the reverse is true and the question is [297] whether a single contract is permissible. Whether a system of such contracts is unlawful is wholly academic.

The agreement on admission prices is lawful under the California statute.

The California statute declares that—

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"(a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this state by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor. (Section 16902, Deering's Business and Professions Code, Div. 7, Pt. 2, Chap. 3.)

Section 16901 states that "Commodity means any subject of commerce."

The franchise describes the pictures to which it applies as those "under the trademark 'Paramount.'" (Pl. Ex. 3, p. 3.)

The plaintiff has introduced no evidence to show that the pictures were not "in fair and open competition" with pictures of other companies. [298]

Wholly Apart From the Paramount Case, the Franchise Does Not Restrain Trade and Is Not Violative of the Sherman Act

The complaint describes the franchise as a contract by which "Partmar convenanted and agreed to exhibit all said motion pictures produced and released by Paramount Pictures." (Complaint, p. 6, lines 6-8.) According to the complaint, Partmar

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was given the exclusive right to all of the Paramount pictures for the duration of the contract. The franchise is thus likened to an exclusive dealing contract. The essential element of the franchises described in the injunction is the right to "all" of the pictures of a film company; but, as the evidence shows, the Partmar franchise neither in terms nor in practice, applied to all of the pictures.

None of the general criticisms of franchises stated by the District Court, and indicated as probable by the Supreme Court in the Paramount Case, but not embodied in the injunctions, apply to the Paramount-Partmar franchise. Those criticisms were that the franchises (1) contain discriminatory clauses favoring theatres of defendants and large circuits, (2) strengthen the strategic position of defendants, (3) discriminate among independents, (4) tie up the distribution of films, and (5) restrict competition by independents to obtain pictures. The evidence fails to show that the franchise, in terms or in practice, is subject to these objections. Indeed, it is much less subject to these objections than other contracts which represent a lawful choice of those with whom one deals.

We can find no decided case in which a contract like the Paramount-Partmar franchise has been dealt with, except the government case. Plaintiff likewise cites no case on the subject, except the government case, that case being the only one cited by plaintiff against the validity of the franchise. United States v. Crescent Amusement Co., 323 U.S.

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173, and Schine v. United States, [299] 334 U.S. 110, appear to be the only other cases dealing with franchises. In those cases franchises in the plural were condemned as violative of the antitrust laws, but only as parts of a melange of monopolistic and conspiratorial practices, on the part of exhibitors who were shown to hold a strong and dominating position in the trade.

In Schine v. United States, 334 U. S. 110 the largest independent exhibitor in the country, with more than 148 theatres, procured by the use of unlawful monopoly power many franchises from the major film companies for the use of pictures in all of the theatres in the circuit. The Court said that as part of the unlawful monopoly power, Schine had procured the franchises:

> "when Schine's buying power was used to acquire films produced by a distributor for two or three years rather than for one year alone, it plainly strengthened through the exercise of monopoly power such dominant position as Schine had over each of its competitors." (P. 118.)

United States v. Schine,
63 F. Supp. 238

In United States v. Crescent Amusement Co., 323 U.S. 173, franchises of an exhibitor operating theatres in seventy towns in five States and applicable to all the theatres, procured by the un-

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lawful monopoly power of the exhibitor and as parts of a conspiracy, were held unlawful.

Even if the franchise were an exclusive dealing contract, it would not be violative of the federal antitrust laws.

Every binding contract of sale restricts in some degree the freedom of the contracting parties, and the same is true, of course, of every motion picture exhibition license. An ordinary contract or license, however, is very different from an exclusive license. A single exclusive license is very different also from a system of exclusive licenses. A system of such licenses by one licensor distributing less than twelve per cent of the feature pictures acting [300] alone (Df. Ex. 4), is very different from a system of such contracts used by one who has a dominating or monopoly position in the trade, or applied by all or almost all of the licensors pursuant to a conspiracy.

No case has held that a single exclusive dealing contract applying to as little as twelve per cent of the supply, is violative of the antitrust laws. Some cases have held that a system of exclusive contracts by one vendor is unlawful; in other similar cases the contrary has been held, depending upon the total effect of the contracts, shown as a matter of fact. Systems of such contracts by one holding a dominant or monopoly position or by two or more pursuant to conspiracy have almost invariably been held to be unlawful.

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On the evidence in this case the Partmar franchise is neither one of a system, or made by one holding a dominant position, or pursuant to a conspiracy.

In Dueber Watch Co. v. Howard Watch Co., 66 F. 637, 645, CCA 2 1895, exclusive dealing contracts were upheld as not violative of the antitrust laws. The court said:

> "It is a device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, 'My goods are for sale only to those who will buy from me exclusively, not to others.' "

In Carter-Crume v. Peurrung, 86 F. 439, 442 CCA 6 1898, the Court upheld as permissible under the antitrust laws, a contract to purchase the entire output of a manufacturer. The Court said:

> "If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from [301] selling to others. But such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each inde-

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pendent producer contracts to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade."

In United States v. Columbia Steel Co., 334 U.S. 495, 524, 1948, it was held that the fact that a transaction would produce permanent exclusive dealing between United States Steel and the largest independent steel fabricator on the Pacific coast, did not make it unlawful.

"The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." (P. 524.)

In Wilder Company v. Corn Products Refining Co., 236 U.S. 165, a system of exclusive dealing contracts was attacked as violative of the antitrust laws, as a defense to payment for goods purchased. The Court refused to hold the system invalid, and characterized it as "inherently lawful." [302]

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In United States v. Standard Oil Co., 78 F. Supp. 863, the Court said that exclusive dealing contracts were not unlawful per se.

> "As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by the evidence, restricts the stations not employe-operated to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal per se. We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it result in a substantial lessening of competition or the creation of monopoly in the line of commerce.

In Whitwell v. Continental Tobacco Co., 125 F. 454, 461, CCA 8 1903, it was held that a single exclusive dealing contract, in the absence of monopoly or conspiracy, was not contrary to the Sherman Act.

> "The tobacco company and its employe were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who

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would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral."

Contracts with purchasers allowing a rebate upon the price paid if all purchases are made from the seller.

Dennehy v. McNulta,
86 F. 825 May 2, 1898

A system of contracts by the producers of coal within a specified area to sell their entire production to the same exclusive agency is not contrary to the Sherman Act.

Appalachian Coals v. United States,
288 U.S. 344.

In United Shoe Machinery Corp. v. United States, 258 U.S. 451, a system of exclusive dealing contracts, was held to be violative of the Clayton Act. In that case a manufacturer of shoe making machinery leased the machines subject to the condition that all like machinery used by lessees be leased only from it, and that all accessories used in operating the machines be purchased from it. The evidence showed that the lessor controlled more than 95 per cent of the business, occupied a dominant position in the trade, and supplied throughout the country a very large percentage of the machinery,

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and that the effect was to substantially lessen competition throughout the United States.

Other cases sustaining the proposition that systems of exclusive dealing contracts are violative of the antitrust laws only where monopoly, conspiracy or substantial lessening of competition is shown, are:

Standard Oil Co. v. United States,
337 U.S. 293;

Mercoid Corporation v. Minneapolis Co.,
320 U.S. 680;

Mercoid Corporation v. Investment Co.,
320 U.S. 661;

Morton Salt Co. v. Suppiger Co.,
314 U.S. 488;

International Business Machines v. United States, 298 U.S. 131, 140;

Continental Wall Paper Co. v. Voight,
212 U.S. 227;

La Chapelle v. United Shoe Mach. Corp.,
90 F. Supp. 721, 722. [304]

If the franchise is an unlawful exclusive dealing contract, the option to evict the tenant because of inability to enforce the exclusive dealing, is also unenforceable, especially where, as here, the landlord intends to reestablish the exclusive use.

Standard Oil Co. v. United States,
337 U.S. 293;

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Mercoid Corporation v. Minneapolis Co., 320 U.S. 680;

Mercoid Corporation v. Investment Co., 320 U.S. 661;

Morton Salt Co. v. Suppiger Co., 314 U.S. 488;

International Business Mach. v. United States, 298 U.S. 131. [305]

The contention of plaintiff that we have been on both sides of the proposition that the franchise is an exclusive dealing contract and is invalid for that reason, is not correct. We have argued, on the allegations of the complaint that the contract is for exclusive dealing contract and was part of the conspiracy in the government case, that it was an unlawful contract, and for that reason plaintiff should procure no relief. In this regard, the evidence is at variance with the complaint, and no such argument has been made on the facts shown by the evidence.

[Endorsed]: Filed March 2, 1951. [306]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

Paramount Productions, Inc. is engaged in the production of motion pictures. A subsidiary, Paramount Distributing Company, is engaged in distributing the motion pictures produced by Paramount Productions, Inc. Paramount Pictures

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Theatres Corporation, another subsidiary, plaintiff herein, is engaged in the operation of motion picture theatres. For the purpose of clarity, any and all of the above-named corporations will hereinafter be referred to as Paramount.

The defendant Partmar Corporation was formed by the owners of Fanchon & Marco, Inc. for the purpose of leasing the Paramount Downtown Theatre in Los Angeles, California, from Paramount. The sole assets and business of Partmar Corporation are the holding of said lease and the operation of Paramount Downtown Theatre. All stock of Partmar Corporation is owned by Fanchon & Marco, Inc. For the purpose of this opinion defendants herein will be referred to as Partmar.

In July, 1938, the United States of America commenced an equity action in the United States District Court of New York entitled: "United States vs. Paramount Productions, Inc., et al.," being Equity Number 87-273, which action was brought against eight (8) major companies of the motion picture industry. The Government charged a conspiracy to carry out in the motion picture industry certain trade practices which were claimed to violate the Sherman Act.

In November, 1940, a Consent Decree was entered in the case in which Paramount, Loew's Inc., Twentieth-Century Fox, Warners and R. K. O. consented. Columbia, United Artists and Universal did not consent. The Consent Decree, hereinafter referred to as the First Consent Decree, was to

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operate for a trial period of three years from the date of entry, to wit: November 20, 1940, during which three-year period the [328] Government could not bring any proceedings to obtain any other or further relief. The Government, being dissatisfied with the First Consent Decree, after the lapse of the three-year period moved, in 1944, to modify the Decree in certain respects. Hearings were had on the Government's application for modification, and on January 11, 1946, a written opinion was filed in which all franchise agreements of longer than a one-year period were held invalid. The opinion is reported in 66 F. Supp. 323.

Thereafter, Findings of Fact, Conclusions of Law, and a Decree were entered on December 31, 1946, (reported in 70 F. Supp. 53), which Decree is hereinafter referred to as the 1946 Decree. Appeals were taken from the 1946 Decree, and in June, 1948, the Supreme Court rendered a decision therein, affirming the lower court in part and reversing it in part. The decision is found in 334 U.S. 131. The case was sent back to the District Court of New York for further proceedings on certain issues.

Following rendition of the decision of the Supreme Court, and before any testimony was adduced at the hearings after remand from the Supreme Court to the District Court of New York, a second Consent Decree was rendered. Paramount Pictures, Inc. was a party to the Second Consent Decree which was entered in the District Court on March

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3, 1949. Six defendants did not consent to the Second Consent Decree, and hearings proceeded against the six non-consenting defendants.

Upon completion of the hearings the New York Court entered a decree in favor of the Government and against the six defendants, in terms substantially the same as those of the Second Consent Decree (85 F. Supp. 881). An appeal was taken from the judgment. The Supreme Court refused to set [329] aside the Judgment and Findings of the lower court, and as a consequence the Second Consent Decree and the Judgment against the six defendants not consenting thereto have become final.

On August 31, 1931, Paramount Pictures, Inc., predecessor of plaintiff herein, as Lessor, entered into a lease agreement with Partmar Corporation, as Lessee, by which Partmar was to take over and operate the Paramount Downtown Theatre for a period of years, upon terms as expressly set forth in said lease. At the same time the lease was entered into, a so-called Film Franchise Agreement was executed by and between said parties, running for the same period of time as the lease. Said franchise agreement generally licensed Partmar to exhibit Paramount pictures at the Paramount Downtown Theatre and required Partmar to exhibit feature pictures released by Paramount.

Tho' two documents were executed—one a lease and the other a franchise agreement—it is evident the lease would not have been entered into if the franchise agreement had not also been entered into

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at the same time; and, conversely, the franchise agreement would not have been entered into unless the lease had been entered into at the same time. Although there were two, separate documents—one the lease and the other the franchise agreement—they were executed at the same time, between the same parties, for the same period of time and, as a consequence, must be considered as one agreement.

The lease expressly provided that if the franchise agreement was "for any reason cancelled or terminated," then Paramount might, at its option, cancel and terminate the lease. At the trial herein it was agreed by respective counsel that "any reason" did not mean capricious or arbitrary [330] but that "any reason" meant substantial, and that the franchise agreement could not be terminated except for a legal or substantial reason.

Plaintiff in its brief states:

> "Plaintiff has not contended, as asserted by Mr. Hardy, that termination of the franchise by the capricious or arbitrary act of Paramount would be effective to terminate the lease * * * Plaintiff is not relying upon any arbitrary or capricious termination. It is relying upon a termination by legal means.
>
> "Plaintiff's position * * * is that the phrase 'for any reason whatsoever' means 'any legal cause' or 'reason, something which the Court would accept as a good reason for terminating.' * * *"

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Paramount contends that the Court in United States v. Paramount Pictures, 70 F. Supp. 53, restrained the defendant Paramount "from further performing any existing franchises to which it is a party." However, Paramount knew this was not a final decree; that it was subject to review. But before the expiration of the time to appeal Paramount served notice of termination of the franchise agreement herein.

Paramount contends that it did not appeal from that portion of the decree restraining it from further performing any existing franchise. However, the case of United States v. Paramount Pictures, Inc., 334 U. S. 131, which was the appeal of the 70 F. Supp. 53 case, discloses that Whitney North Seymour argued the case (before the Supreme Court) for Paramount Pictures, Inc., et al. (Appellants' No. 81); with him on the brief were Louis Phillips and Albert C. Bickford. Not only did Paramount know at the time notice of termination was given [331] that the decision in 70 F. Supp. 53 was not a final decision, but it actively participated in an appeal to the Supreme Court from at least a part of that decree.

The Supreme Court, after hearing appeals in the case, including Paramount's, said, at page 156:

> "* * * But we cannot say on this record that franchises are illegal per se * * * Hence we set aside the findings on franchises* * *"

The first question presented to this Court is

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whether a decree, which is subsequently set aside, is a legal cause or reason for termination of the franchise agreement.

The Court of Appeals (9th Circuit) in the case of Keller v. Hall, 111 F. (2d) 129, stated the rule when it held:

> "* * * Moreover, the judgment theretofore rendered in the case, after it was reversed, was 'without any validity, force, or effect.' " ((Page 131)).

The same rule is set forth in a little different manner by the Supreme Court in the case of Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, when it said (at page 145):

> "* * * a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, is was regularly a part of a judgment of reversal that the plaintiff in error 'be restored to all things which he [332] hath lost by occasion of the said judgment'; * * *"

The Supreme Court also said, in the case of B. & O. R. Co. v. United States, 279 US 781, at 786:

> "The right to recover what one has lost by

the enforcement of a judgment subsequently reversed is well established."

The Circuit Court of Appeals of the Second Circuit, in Bondy v. Hardy, 62 F.(2d) 521, stated the rule in another way by saying:

"* * * The effect of the reversal * * * was to put the parties in the same position as if no judgment has been entered."

Consequently, we are of the opinion that the restraining order, subsequently set aside by the United States Supreme Court, was not a legal cause or reason for terminating the franchise agreement.

Plaintiff contends, however, that if it was not justified in terminating the franchise agreement because of the decree, nevertheless it did have a right to terminate the franchise agreement as it was an illegal agreement and was illegal from its inception and thus could be terminated at any time. Hence, we now proceed to the question of the legality of the franchise agreement.

As heretofore mentioned, Paramount gave the following notice to Partmar:

"March 26, 1947.

"Partmar Corporation,
"Paramount Theatre,
"Los Angeles, California.

"Gentlemen: [333]

"You are hereby given notice that the undersigned, one of the parties to the film franchise

agreement, made and entered into on August 30, 1939, as of September 1, 1939, between the undersigned and you, as amended by agreement dated September 1, 1942, made between the same parties, has bee enjoined from further performing said franchise as amended by Decree of the United States District Court for the Southern District of New York, entered December 31, 1946, and modified by order entered February 1, 1947, in the case of United States of America, Plaintiff, against Paramount Pictures, Inc., Paramount Film Distributing Corporation, et al., bearing Index Number Equity 87-273.

"You are therefore hereby notified that the said franchise agreement as amended be and the same hereby is cancelled and terminated, effective as of the close of business on the 31st day of March, 1947.

"Very truly yours,
"PARAMOUNT
PICTURES, INC.,
"By PAUL RAEBOURN,
"Vice President.

"LP:V
"Reg.Mail-Spec.Del."

Although it is the contention of plaintiff that it had a right to terminate the franchise agreement because of its illegality, it will be noted that the only reason given for termination of the franchise agreement was the restraining order made by the United States Court.

On March 30, 1947, Paramount gave notice to the defendants that the lease had been terminated under that [334] clause of the lease which provided that if the franchise agreement was "for any reason" cancelled or terminated, Paramount had the right to terminate the lease. On April 7, 1947, notice to quit was served on Partmar, and when Partmar failed and refused to vacate the theatre building, this action was commenced.

For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. Paramount Theatre was Paramount's first-run theatre in Los Angeles. The theatre was first built and operated by the producing company for the sole purpose of having an outlet in Los Angeles for its pictures' first runs. When the lease was made and executed between Paramount and Partmar, it was the desire of Paramount and the distinct understanding of all parties that Paramount Theatre would be the theatre in which Paramount pictures would have their first runs in Los Angeles.

The motion picture industry, like Topsy, "just growed," and the lusty, sprawling buiness of today is vastly different from the industry at its inception. In the beginning there were no rules or regulations as guide posts. As problems were presented they were solved by the industry, and over the years

a code of conduct was developed which was accepted and eventually adopted by all of the major studios.

Like other industries, the motion picture industry discovered there were two phases of its business, the main phase being that of producing or actually making pictures; while the other, and perhaps of greater financial importance, was that of selling or distributing the studios' products. [335] All great businesses have learned that production itself is only the beginning and, if a business is to succeed, some adequate scheme of distribution must be developed. All industries have not followed the same pattern of distribution. As a result, various types of businesses have adopted a diversity of ways and means to dispose of their products.

Obviously, it would be impossible for one motion picture producer to print sufficient film to permit distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then prorated to exhibitors for use. As all exhibitors could not use the same film at the same time, some arrangement had to be made for first use, second use, third use, et cetera. It is probable that in the early days of the industry producers had difficulty in obtaining exhibitors to show their films, but as time went on and the number of exhibitors increased it became competitive among exhibitors as to which should obtain the first, second or third-run rights of films.

No attempt was made by producers to divide the

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country into zones for distribution. No attempt was made by producers to divide the nation's large cities into zones and allocate to each zone a producer. The producers generally have operated in all parts of the country and in all cities. Although producers made no effort to divide cities into areas, nevertheless each major studio through its distributing agency was as a matter of necessity forced to allocate first, second or third-run rights of its pictures to individual exhibitors. Over the years producers and distributors have founded a course of conduct based on the right to exhibit films first, second or third, within a given community. [336] Certain specified theatres had the right of third run; others had the right of second run, while still others had the right of first run. Producers and distributors also built up a policy of clearance between the end of the first run and the beginning of the second run; the end of the second run and the beginning of the third run.

It is the accepted law of the land that individuals within an industry may not combine for the purpose of controlling competition. Toward the end of the late depression, however, the government attempted to do for various industries that which theoretically they could not do for themselves, and as a result Congress passed the National Recovery Act, commonly known as "N.R.A." Under such legislation industries were allowed to set up codes of fair competition. The motion picture industry in Los Angeles availed itself of the N.R.A. plan and es-

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tablished a code of fair competition which embraced the question of first, second and third runs, clearances between runs; minimum prices, et cetera. Although the Supreme Court of the United States, in Schechter Poultry Corporation, et al., vs. United States, 295 US 495, held such a code invalid, evidence in the case at bar indicates that the code as established for the motion picture industry in Los Angeles under N.R.A. is the basis of the code of fair conduct now in use in the motion picture industry in Southern California.

Paramount, not in conjunction with any other major studio, entered into the franchise agreement which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles.

One of our fundamental legal rights is that of making contracts. Contracts freely made should be upheld. It is not the duty of courts to look for some reason to set [337] aside contracts freely entered into by and between individuals of their own volition; for individuals should have the right to make contracts as they see fit. The courts should seek reasons to sustain existing contracts legally entered into. Hence, as we see it, the duty of this court is to uphold the contract entered into between Paramount and Partmar, unless it was entered into because of misrepresentation, fraud, undue influence, et cetera, or unless the contract is illegal and void because it violates statutory provisions.

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There is no evidence in this case that the contract was executed between the parties through misrepresentation, fraud or undue influence; and if the contract is to be set aside, it must be set aside on the ground that it is an illegal contract.

Plaintiff contends the franchise agreement is illegal and void (in violation of the anti-trust acts) for four reasons:

1. Because of its minimum price provisions.
2. Because of book blockings.
3. Because of runs.
4. Because of clearances.

The questiion of runs and clearances presents a most difficult problem. It is admitted by all the expert witnesses (both plaintiff's and defendant's) who testified in this case that runs and clearances are necessary in the motion picture industry. As heretofore mentioned, it is impossible to allow all theatres to show the same picture at the same time; hence some preference must be given to certain theatres. Runs and clearances have been used for many years, and even those permitted only second or third-run rights are nevertheless of the opinion that runs are necessary and that there [338] should be clearances between runs. In other words, after a theatre finishes a picture there should be a lapse of some days before the same film should be shown in another theatre in the same neighborhood.

However, the question here is not whether runs

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and clearances are necessary but whether the runs and clearances are reasonable. Testimony in this case indicates that within the Los Angeles metropolitan area there had been established the policy of first, second, third and subsequent runs, and there had been established clearances of 7, 14, 21, et cetera, days. Testimony also established the fact that theatres admittedly not in direct competition with downtown Los Angeles theatres were given the same runs and the same clearances as those in the downtown area of Los Angeles. For instance, theatres in San Diego (122 miles from Los Angeles), Santa Ana (35 miles from Los Angeles), Riverside (53 miles from Los Angeles), San Bernardino (60 miles from Los Angeles), Bakersfield (111 miles from Los Angeles), and Santa Barbara (96 miles from Los Angeles) were allowed to exhibit films the same day and date as released in Los Angeles. Motion picture theatres located in such communities were considered to be so far distant as to be not in substantial competition. Consequently, there was no necessity for establishing a different run or allowing a clearance over Los Angeles. Runs and clearances were allowed only as to those theatres in substantial competition with downtown Paramount.

The question arises whether or not the runs and clearances were reasonable as to such theatres in substantial competition. It is difficult to define "substantial competition." What is the yardstick to be used? What bounds the term "substantial competi-

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tion?" Who is to decide what [339] is "substantial competition"—each individual distributing company? Some Board? Or the courts?

Substantial competition is also something which may change from year to year; and substantial competition in Los Angeles, where transportation depends primarily upon the individual automobile, may be entirely different from substantial competition in New York or Chicago. From how far distant does Paramount Downtown Theatre draw its attendance? Does it depend for patronage upon those who drive into downtown Los Angeles by automobile or the commuter who comes into Los Angeles by interurban, or upon those who live in the downtown area? Population, ease of transportation, accessibility, et cetera, may determine to a great exent "substantial competition."

It is agreed that within a limited area Partmar should be protected as to runs and clearances, but where that area ends depends upon many factors. There is no contention that any other theatre within a radius of a few blocks of the Paramount Downtown Theatre should have the right to show the same Paramount films as exhibited by Partmar at the same time. Plaintiff's contention is, however, that the runs and clearances as established by the parties hereto are unreasonable, inasmuch as they extend out beyond the zone of substantial competition.

It has been assumed by the parties hereto that Partmar has an exclusive right to show Paramount

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Pictures first-run in the metropolitan area of Los Angeles. But it should be pointed out that nowhere in the agreement is the word "exclusive" used. It may be that the parties have interpreted the agreement to be an exclusive agreement but, if they have, they have read into the contract something which does not [340] specifically appear there. It is Paramount's contention that Partmar has insisted it has an exclusive, first-run right in the Los Angeles metropolitan area, and it may be that Paramount has acceded to such interpretation of the franchise agreement. The parties may have interpreted the contract to be an exclusive contract when, in fact, it is not.

Where there is a restricted community, whether rural or urban, in which there is more than one theatre, one theatre certanly must be given preference over the others. Neither the theatre owner, producer, nor distributor would want their pictures shown simultaneously in two theatres adjacent to or across the street from each other. The theatre owners themselves wish to have the right to show a picture first within a given community. As a result the distributor must determine which theatre is to have prior right. We do not believe that any motion picture theatre, without a contract to the contrary, is privileged to demand as a matter of right first-run privilege on any particular picture. It seems to the Court that the distributing company should have the right, where competition exists, to determine for itself which theatre shall have prior

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right to its pictures. This determination on the part of the distributor might depend upon several things —location, size of theatre; whether or not it is a new or an old installation, modern conveniences, and management. A motivating force in the motion picture business is income, and the distributor, all other things being equal, will give the right of showing pictures to the theatre likely to produce the greatest revenue.

During the past few years there seems to have developed within the motion picture exhibitors' industry the idea that any theatre had the right to demand prior runs. [341] As a result, when prior runs have not been made available, they have applied to the courts for enforcement of that so-called right.

We are not of the opinion that any theatre has the right, as a matter of law, to demand from a motion picture producer the right of prior runs, any more than the seller of automobiles has the right to demand of the manufacturer an agency within a restricted territory. If the automobile manufacturer has the right to establish an exclusive agency within a restricted area for the sale of its product and to refuse to license any other agency within that restricted area, it would seem to the Court that the motion picture distributor should have the same right and privilege.

In Federal Trade Commission v. Raymond Bros.-Clark Company, 263 US 565, the Circuit Court of

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Appeals held that the Raymond Company had the lawful right to select any particular merchandise which it wished to purchase and to select any person or corporation from whom it might wish to make its purchase and that it also had the unquestioned right to discontinue dealing with any manufacturer. The Commission contended that the conduct of the Raymond Company, acting alone and not in combination with others, constituted an unfair method of competition, but the Court said:

> "It is the right, 'long-recognized,' of a trader engaged in an enitrely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal.' * * *
>
> "A different case would of course be presented if the Raymond Company had combined and agreed with other wholesale dealers [342] that none would trade etc. * * * An act lawful when done by one may become wrongful when done by many acting in concert, taking on the form of a conspiracy * * *"

The Supreme Court sustained the Circuit Court.

In the case at bar there is no proof of conspiracy. Webster's New International Dictionary, Second Edition, defines conspiracy as follows:

> "conspiracy (3). Law. An agreement, manifesting itself in words or deeds, by which two or more persons confederate to do an unlawful act, or to use unlawful means to do an act which is lawful; * * *"

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If the franchise agreement in question had been brought about because of an understanding among production companies or because of an agreement with the exhibitors, we could then understand how it might be said that the contract was an agreement based upon conspiracy; but there is no evidence to indicate that any third party conspired with either Paramount or Partmar to bring into existence the franchise agreement.

If the parties to the franchise agreement had combined to restrain freedom of interstate commerce in the transportation, sale or exhibition of motion pictures, the position of plaintiff that the franchise agreement is void might be tenable, but the evidence in this case does not indicate in any manner that the franchise agreement interfered in any way with the freedom of interstate commerce.

In the absence of conspiracy, a minimum price agreement is lawful in California. The evidence in this case shows at most nothing more than one agreement on admission [343] prices between one film company and one exhibitor, applicable to one theatre. There is nothing to indicate that the admission prices set were the same as those used by other theatres and no evidence to indicate a conspiracy between exhibitors and producers to maintain minimum prices at any number of theatres. At most it was an agreement affecting only one theatre.

If plaintiff had established by competent evidence that the prices as set forth in the franchise agreement were, in general, uniform and used by other

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theatres as the result of a price fixing agreement by the film companies or the exhibitors, there would be some basis for the Court to sustain plaintiff's contention. However, a single contract between one film company and one exhibitor is not violative of the Sherman Act.

In Binderup v. Pathe Exchange, 263 US 291, the Court said, at page 312:

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, * * * The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor."

In discussing resale prices, the Court said in Park, etc. v. Hartman, 153 Fed. 24, at page 37:

> "Each (case—[Elliman & Sons v. Carrington, etc., L. R. 1901, 2 Ch. Div. 275, and Garst v. Harris, 177 Mass. 72; 58 NE 174]) involved only a single transaction by which the [344] article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid

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and not such a restraint of trade as to be obnoxious to the law."

In United States v. Paramount, 334 US 131, the Court dealt with not a single contract on admission prices but with a system of such contracts to "regiment an entire industry on admission prices."

In Federal Trade Commission v. Curtis Publishing Company, 260 US 568, the Commission contended that Curtis Publishing Company was violating the Clayton Act because it entered into contracts with its distributors in which the distributors agreed to refrain from selling or distributing certain competitor publications and agreed to maintain prices as established by the Curtis Publishing Company.

The Supreme Court held that there was not sufficient evidence to show that the respondent intended to practice unfair methods or unduly to suppress competition or to acquire a monopoly, saying, at page 582:

> "The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and when standing alone, certainly affords no ground for condemnation under the statute." [345]

Again the Court said, in United States v. General Electric Co., et al., 15 F.(2d) 715:

> It must "be conceded that he (the manufacturer) may fix the price at which he will sell, and may select the agents whom he wishes to

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represent him, and may fix the price at which these agents may sell the principal's goods."

In Coca-Cola Bottling Co. v. The Coca-Cola Co., 269 Fed. 796, the defendant contended that a contract entered into by the parties was in restraint of trade and pointed out certain covenants of the contract to substantiate his position.

The Court said, at page 815:

"* * * It is unnecessary to analyze the several covenants pointed out as being in unreasonable restraint of trade. Those covenants at most operate as a partial and not as a general restraint, and are 'merely ancillary to the main purpose of a lawful contract, * * *' "

In regard to block booking, it does not appear to this Court that the franchise agreement as entered into between the parties comes within the meaning of "block booking" as defined by the Supreme Court, which has described the term as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor shall also license another feature or group of features released by the distributors during the given period." (U. S. v. Paramount, 334 US 131.)

There is nothing to show that Partmar obtained a license for any particular picture with the understanding that it would also have to license other pictures. The [346] franchise agreement discloses that Partmar was to have Los Angeles first-run rights on all pictures produced by Paramount; and

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there is no evidence to indicate this right depended upon the taking of any particular feature picture. The fact of the matter is that neither Paramount nor Partmar knew from year to year what feature pictures were to be available for exhibition. The evidence discloses that on many occasions Partmar did not show Paramount Pictures for the first time in Los Angeles, as such pictures were shown either under a pre-release agreement, a road show contract, or by other exhibitors.

From the foregoing, we are constrained to hold the franchise agreement is not in itself an illegal agreement; consequently, plaintiff had no right to cancel or terminate it because of illegality.

Inasmuch as plaintiff had no right to terminate or cancel the franchise agreement, it had no right to terminate or cancel the lease and thus failed to establish its right to maintain this action in unlawful detainer.

Plaintiff's claim for damages must also fall because it has not sustained its contention that it was entitled to terminate the lease and demand a return of the theatre.

Defendant filed an answer to plaintiff's complaint, which answer contained three counterclaims:

1. For excessive charges for pictures.
2. For excessive theatre rental.
3. For over-payment of theatre rental.

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Subsequently a further counter-claim was added by amendment, alleging that as a part of the conspiracy Paramount required Partmar to make payment for short-subject motion pictures [347] which Partmar did not need and did not use.

At the time of trial it was agreed that action on the counter-claims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counter-claims.

It appears that all of the counter-claims, with the exception of the Third Counter-Claim, are based upon conpiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counter-claimant cannot recover upon the First, Second and Fourth Counter-Claims. Therefore, it will not be necessary to take evidence on such counter-claims.

By its Third Counter-Claim defendant has alleged there was an overpayment of rent made to the plaintiff on behalf of defendant in the sum of $10,666.71.

In its Third Cause of Action plaintiff alleges Paramount made a loan to Partmar in the sum of $28,000.00, evidenced by a promissory note executed by Partmar; that said note has fully matured and there is an unpaid principal balance of said note to April 1, 1947, in the sum of $12,000.00, together with interest thereon at the rate of 2% per annum from September 1, 1946.

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No disposition is now made by the Court of either the Third Cause of Action of plaintiff's complaint or the Third Counter-Claim as set forth by the defendant. Trial on the Third Cause of Action and the Third Counter-Claim will be had at some future date.

Findings in conformity with this memorandum of opinion will be prepared by defendant.

Dated May 2nd, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed May 2, 1951. [348]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for a [350] non-jury trial on November 8, 1950, and continued from day to day until December 21, 1950, in the courtroom of the Honorable Harry C. Westover, Judge; plaintiff and third party defendants being represented by O'Melveny & Myers, Jackson W. Chance and Rodney K. Potter; and defendants and third party plaintiffs being represented by MacFarlane, Schaefer & Haun, Henry Schaefer, Jr., William P. Gamble, James H. Arthur and Russell Hardy; whereupon evidence both oral and

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documentary was introduced, the cause was submitted for decision upon written briefs; wherefore, the court being fully advised in the premises, now renders its decision as follows:

Findings of Fact

1. The allegations and each of them contained in Paragraphs 1, 2, 3, and 4 of the first cause of action of the complaint are and each is true.

2. On August 31, 1939, Paramount Pictures, Inc., predecessor of plaintiff herein, as lessor, entered into a lease agreement with Partmar Corporation, as lessee (herein referred to as "Partmar"), by which Partmar agreed to lease and operate the Paramount Theatre at Sixth & Hill Streets, Los Angeles, California, for a period of ten years (Plaintiff's Exhibit 1 being a true and correct copy of said lease agreement).

3. At the same time said lease (Exhibit 1) was entered into, a film franchise agreement was executed by and between Paramount Pictures, Inc., and Partmar, for the same period of time as said lease. Said franchise agreement generally licensed Partmar to exhibit Paramount pictures at the [351] said Paramount Theatre and required Partmar to exhibit feature pictures released by Paramount (Exhibit 3 being a true and correct copy of said franchise agreement).

4. Although two documents were executed, one,

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the said lease and the other, the said franchise agreement, the lease would not have been entered into if the franchise agreement had not also been entered into at the same time. Likewise, the franchise agreement would not have been entered into unless the lease had been entered into at the same time. Though contained in two separate documents the lease and the franchise agreement constituted but one agreement between the parties.

5. Partmar was formed by the owners of Fanchon & Marco, Inc., for the purpose of leasing the Paramount Downtown Theatre in Los Angeles, California, from Paramount Pictures, Inc. The sole asset and business of Partmar are the holding of said lease and the operation of said theatre. All stock of Partmar Corporation is owned by Fanchon & Marco, Inc., which latter corporation executed a guaranty of performance of said lease and said franchise agreement by Partmar.

6. The term of said lease, of said franchise agreement and of said guaranty was extended by amendatory agreements entered into between the parties thereto under date of September 1, 1942, (Exhibit 2 and Exhibit 4) by virtue of which the said term of said lease, said franchise agreement and said guaranty was extended to March 18, 1952.

7. The allegations and each of them contained in [352] Paragraph 8 of the first cause of action of the complaint are true, except that from and after December 31, 1949, all the stock in plaintiff corporation has been and is now owned by United

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Paramount Theatres, Inc., a corporation, pursuant to the second consent decree (dated March 3, 1949, referred to herein).

8. Said lease expressly provided that if the said franchise agreement "be cancelled or terminated for any reason whatsoever," then the lessor might at its option cancel and terminate the lease. This provision did not mean that a capricious or arbitrary termination of the franchise agreement would authorize termination of said lease; it meant rather that if the franchise agreement were terminated for a legal or substantial reason the lease could be terminated.

9. On or about July 20, 1938, United States of America filed suit in the United States District Court for the Southern District of New York against Paramount Pictures, Inc., and others in that certain suit entitled "United States of America, plaintiff v. Paramount Pictures, Inc., et al., defendants," being Equity No. 87273, alleging violations by the defendants, including Paramount Pictures, Inc., and its subsidiary corporations, of Sections 1 and 2 of an Act of Congress of July 20, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restrictions and Monopolies," commonly known as the Sherman Act. Said action was tried and on June 11, 1946, a written opinion was filed in which all franchise agreements, that is license agreements embracing pictures released during a period longer than a year, were held invalid.

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Thereafter findings of fact, conclusions of law and decree were entered on December 31, 1946, (which decree is [353] hereinafter referred to as "the 1946 decree"). In the 1946 decree the trial court enjoined Paramount Pictures, Inc., and all its subsidiaries and affiliates:

> "From further performing any existing franchise to which it is a party and from making any franchises in the future."

The effective date of said decree was April 1, 1947.

10. On March 26, 1947, plaintiff served Partmar with a notice purportedly terminating said franchise agreement as of the close of business on the 31st day of March, 1947, (Exhibit 18 being a true and correct copy of said notice).

11. On April 2, 1947, plaintiff served Partmar with a notice purporting to terminate said lease by reason of the termination of said franchise agreement (Exhibit 19 being a true and correct copy of said notice).

11-a. On April 7, 1947, plaintiff served Partmar with a notice to quit possession of said leased premises (Exhibit 21 being a true and correct copy of said notice to quit).

12. Partmar has at all times refused to vacate and surrender possession of said Paramount Theatre to plaintiff, contending that said franchise agreement is lawful and that said notices are ineffective.

13. Appeals were taken from portions of the

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1946 decree. In June, 1948, the Supreme Court of the United States rendered a decision therein, affirming the lower court in part [354] and reversing it in part. The case was sent back to the District Court of New York for further proceedings on certain issues. The findings of the court below that all franchises were illegal and the order enjoining the performance of such agreements were set aside.

14. Following rendition of the decision of the Supreme Court, and before the testimony was closed and before the rendition of any decision after remand from the Supreme Court to the District Court of New York, a second consent decree to which Paramount Pictures, Inc., was a party, was rendered, dated March 3, 1949. Thereafter another defendant, RKO, was party to a consent decree. Six defendants did not consent to the second consent decree and hearing proceeded against the six non-consenting defendants.

Upon conclusion of the hearings, the New York Court entered a decree in favor of the Government and against the six non-consenting defendants, in terms substantially the same as those of the second consent decree. An appeal was taken from the judgment. The Supreme Court refused to set aside the judgment and findings of the lower court, and as a consequence the judgment against the said six non-consenting defendants has become final. Paramount is enjoined by said second consent decree from further performing any existing franchise to which it is a party and from making any

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franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. Defendant Partmar is an independent exhibitor in competition with theatres affiliated with defendants in United States v. Paramount Pictures, Inc., et al.

15. For many years in Los Angeles it was the established [355] practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. The Paramount Theatre was Paramount's first-run theatre in Los Angeles. The theatre was first acquired and operated by the producing company for the sole purpose of having an outlet in Los Angeles for its pictures first-run. When the lease was made and executed between Paramount and Partmar it was the desire of Paramount and the distinct understanding of all parties that the Paramount Theatre would be the theatre in which Paramount pictures would have their first-run in Los Angeles.

16. In the beginning of the motion picture business there were no rules or regulations to serve as guide posts for the solution of the distribution problems which arose. Over the years these problems were solved by the industry as they were presented and there evolved a method of distribution which was eventually accepted and adopted by all the motion picture producers.

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It would be economically impossible for one motion picture producer to print sufficient film for distribution simultaneously to all theatres in the nation. Some plan had to be devised by which a few prints could be made and then pro-rated to exhibitors for use. As all exhibitors could not use the same film at the same time, some arrangement had to made for first use, second use, third use, etc.

No attempt was made by the producers to divide the country into zones for distribution. No attempt was made by producers to divide the nation's large cities into zones and to [356] allocate to each zone a producer. The producers generally have operated in all parts of the country and in all cities. Although producers made no effort to divide cities into areas, nevertheless each major producer through its distributing agency was as a matter of necessity forced to allocate first, second or third-run rights of its pictures to individual exhibitors. Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films first, second or third run within a given community.

Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.

Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run.

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17. Runs and clearances are necessary in the motion picture industry. It is impossible to allow all theatres to show the same picture at the same time; and some preference must be given to certain theatres.

18. The run and clearance established for the Downtown Paramount Theater by the franchise agreement was, with minor exceptions, that contained in the NRA schedule of zones and clearances, defendants' Exhibit C. As provided in said schedule a clearance of 7, 14 and 21 days respectively was accorded said Paramount Theatre over subsequent run theatres in the Los Angeles metropolitan area. With minor changes said run and clearance has been maintained under said franchise agreement. Runs and [357] clearances were allowed only as to those theatres in substantial competition with the Downtown Paramount Theatre. The clearances allowed the said Paramount Theatre over other theatres in the Los Angeles metropolitan area were and each was reasonable.

19. Said franchise agreement did not provide for an exclusive first-run for the Downtown Paramount Theatre in the metropolitan area of Los Angeles. Said franchise agreement does provide for a first-run exhibition at said Paramount Theatre. It does not, however, restrict Paramount from granting simultaneous first-runs at other theatres in the Los Angeles metropolitan area or elsewhere.

20. Paramount, not in conjunction with any other major studio, entered into the franchise agree-

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ment which gave to Partmar the right to exhibit the first-run feature pictures of Paramount in the City of Los Angeles. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons.

21. It is neither the purpose nor effect of said lease, or said franchise agreement, or of any amendments to either of them, or of any performance thereunder, to restrain or monopolize trade or commerce among the several states in the production, distribution, transportation, sale or exhibition of motion pictures. [358]

22. The minimum price provision contained in the franchise agreement constitutes no more than an agreement between one exhibitor and one distributor affecting the admission price to be charged at one theatre. Said agreement was not a part of and did not arise out of any conspiracy between exhibitors and producers or either of them to maintain minimum prices at any theatre.

23. Said franchise agreement did not require Partmar to license any given picture or pictures in order to obtain a license upon any other pictures. The franchise agreement discloses that Partmar was to have Los Angeles first-run rights on all pictures produced by Paramount. This right did not

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depend upon the taking of any particular feature picture.

24. The allegations and each of them contained in Paragraphs 2 and 3 of the third cause of action in the complaint are and each is true.

25. The allegations and each of them contained in Paragraphs 2 and 3 of the fourth cause of action in the complaint are and each is true.

26. The allegations and each of them contained in Paragraph 2 of the fifth cause of action in the complaint are and each is true. [359]

Upon the foregoing findings of fact, the court makes the following:

Conclusions of Law

1. The court concludes in all respects as set forth in the foregoing findings of fact. Any conclusion of law set forth in the foregoing findings of fact is hereby incorporated by this reference thereto in these conclusions of law.

2. Said findings of fact having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

3. The 1946 decree in Equity No. 87273 is so far as it held illegal and restrained the performance of all franchise agreements was subsequently set aside by the United States Supreme Court and was

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not therefore a legal cause or reason for termination of the franchise agreement between Paramount Pictures, Inc., and Partmar.

4. The court should seek reasons to sustain existing contracts legally entered into.

5. For the purpose of clarity of the transaction which is the subject of this action, plaintiff and Paramount Pictures, Inc., should be considered as "Paramount." [360]

6. The franchise agreement between Paramount and Partmar is in all respects legal.

(a) Where there is a restricted community, whether rural or urban, in which there is more than one theatre, one theatre must be given preference over the others. The distributing company has the right where competition exists to determine for itself which theatre shall have prior right to its pictures. In making such determination said distributor must give consideration to such factors as location and size of theatre, age, appointments and management. When such determination has been made the theatres do not have the right, as a matter of law, to demand from a motion picture producer the right of prior runs. The fact that the parties performed said franchise agreement as though it were exclusive did not render it illegal.

(b) The clearance accorded to Partmar by

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Paramount pursuant to said franchise agreement was reasonable and lawful.

(c) The minimum admission price provision of said franchise agreement was in all respects lawful.

(d) The provisions contained in said franchise agreement requiring Partmar to exhibit Paramount pictures 46 weeks out of each year were in all respects lawful.

7. Paramount had no right to cancel or terminate the franchise agreement.

8. Inasmuch as neither Paramount had no right to [361] terminate or cancel the franchise agreement, Paramount had no right to terminate or cancel the lease. Paramount, therefore, has no right to possession of the theatre, or for damages for any alleged withholding thereof.

9. Defendant Fanchon & Marco, Inc., has not incurred any liability pursuant to its guarantee of performance of said lease by Partmar.

10. Paramount is entitled to an adjudication and declaration of the rights of the parties hereto arising out of the execution and performance of the lease and franchise agreement aforesaid and of the purported termination thereof.

11. Inasmuch as the said lease and said franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any com-

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bination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; inasmuch as said lease, said agreement and amendments thereto have neither the purpose or effect of restraining or monopolizing trade or commerce among the several states in the production, distribution, transportation, sale or exhibition of motion pictures; and inasmuch as each was an agreement solely between plaintiff and defendants, or defendants and third party plaintiffs and third party defendants dealing solely with the Paramount Theatre Los Angeles alone and the exhibition of pictures thereat; third party [362] plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them.

Dated this 18th day of June, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Receipt of Copy acknowledged.

Lodged June 18, 1951.

[Endorsed]: Filed June 18, 1951. [363]

BLEED THROUGH– POOR COPY

In the United States District Court for the Southern District of California, Central Division
Civil No. 6906 HW

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, et al.,

Defendants.

PARAMOUNT PICTURES THEATRES CORPORATION, a Corporation,

Plaintiff,

vs.

PARTMAR CORPORATION, a Corporation, et al.,

Defendants and
Third Party Plaintiffs,

vs.

PARAMOUNT PICTURES, INC., et al.,
Third Party Defendants.

JUDGMENT

The decision herein having been duly signed and filed:

I.

It Is Ordered, Adjudged and Decreed that defendants Partmar Corporation and Fanchon & Marco, Inc., have judgment against plaintiff Paramount Pictures Theatres Corporation as follows:

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1. That the said plaintiff take nothing by the first cause of action of its complaint.

2. That the said plaintiff take nothing by the second cause of action of its complaint.

3. That said plaintiff take nothing by the fourth cause of action of said complaint.

II.

It Is Further Ordered, Adjudged and Decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same hereby are, each dismissed with prejudice, and the defendants each take nothing by their said counterclaims.

III.

It Is Further Ordered, Adjudged and Decreed that the rights and duties of the parties be declared as follows:

1. The agreement between Paramount Pictures, Inc., and Partmar Corporation, guaranteed by Fanchon & Marco, Inc., [365] is a valid subsisting agreement in full force and effect. Said agreement provides for the privilege to exhibit first-run at the Downtown Paramount Theatre all Paramount pictures upon their general release. Such first-run privilege is not, however, exclusive and any number of simultaneous first-runs may be licensed to other parties to run concurrently therewith.

2. The lease of the Paramount Theatre between plaintiff and defendant Partmar Corporation, guar-

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anteed by Fanchon & Marco, Inc., is a valid and subsisting agreement in full force and effect, until March 18, 1952, when the said lease by its terms comes to an end.

IV.

Neither party shall recover costs against any other party.

/s/ HARRY C. WESTOVER,
District Judge.

Judgment entered June 19, 1951.

Receipt of Copy acknowledged.

Lodged June 18, 1951.

[Endorsed]: Filed June 18, 1951. [366]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Partmar Corporation and Fanchon & Marco, Inc., Third Party Plaintiffs above named, hereby [368] appeal to the United States Court of Appeals for the Ninth Circuit from that portion of the final Judgment entered in this action on the 19th day of June, 1951, in Judgment Book 73 at page 126, wherein it is ordered, adjudged and decreed that the first, second and fourth counterclaims of third party plaintiffs Partmar Corporation and Fanchon & Marco, Inc., be, and the same are, each dismissed with prejudice, and

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the defendants take nothing by reason of said counterclaims.

Dated July 16, 1951.

MacFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,
By /s/ WILLIAM GAMBLE,
Attorneys for Defendants and Third Party Plaintiffs.

RUSSELL HARDY,
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 16, 1951. [369]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 6906-WM—Civil

[Title of Cause.]

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday, June 2, 1949

Appearances:

For the Plaintiff and Third Party Defendants:
O'MELVENY & MYERS, by
JACKSON P. CHANCE, ESQ., and
J. B. CARMAN, ESQ.

For the Defendants and Third Party Plaintiffs:
MacFARLANE, SCHAEFER & HAUN, by
HENRY SCHAEFER, JR., ESQ.,
WM. P. GAMBLE, ESQ., and
RUSSELL HARDY, ESQ.

* * *

By Mr. Chance:

Now, there are four independent grounds that, as a matter of law, we respectfully submit, your Honor may upon this motion rule whether or not this Paramount-Partmar franchise is violative of the Anti-Trust Laws, was properly terminated, that is, the lease was properly terminated by the notices given in March and April of 1947, prior to the com-

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mencement of this action, and therefore that the plaintiff is entitled to the judgment of the court.

The four grounds that we believe your Honor may determine at this time as a matter of law and upon this record go to the essential parts of the franchise and violate the Anti-Trust Laws, if your Honor so determines, are, first, the minimum admission price provision in the franchise agreement; secondly, the fixed clearance provisions of the franchise agreement; thirdly, the so-called block booking feature requiring exclusive exhibition of pictures distributed or released by Paramount over a period of 46 out of 52 weeks of each year; fourth, that this franchise being with a substantial circuit is within the ruling of the Supreme Court.

Then there is a fifth ground that renders the lease itself, as amended, unenforceable in view of the provision of the 1946 decree in the expediting court in U. S. v. Paramount, which [40*] was not disturbed on appeal and which has been, therefore, carried into the formal consent decree entered in March 3, 1949, in that case; that is the provision with regard to the net profit rental provisions of the lease, as amended. [41]

* * *

November 8, 1950

That is the basic thing on this first case, and it will take us until we take a recess before Thanksgiving, and that is the first thing we are going to thrash out, if your Honor will permit. [18]

* * *

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

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I want to say at the same time, in all fairness, Judge Mathes held, as far as the counter-claims are concerned, as counter-claims they state a cause of action and they had to go on trial, and then when he set the case for trial he made an order setting the unlawful detainer action, the plaintiff's right to recover possession of the theatre, down as a separate trial, to be tried out first on the first cause of action of the complaint, the second cause of action of the complaint, and the fifth cause of action of the complaint.

He then ordered that the issue of damages on the plaintiff's unlawful detainer action be deferred and tried after the first trial. Then he ordered that the trial of the counter-claims be a separate trial and come on for trial after and following the trial of these first two matters I have mentioned. [22]

* * *

The Court: Well, I just wanted to get your ideas as to whether or not this was one agreement or two separate independent agreements.

Now, I am rather interested in the statement opposing counsel made to the effect that in opposition to the claim for return of the theatre the defense was raised that the plaintiff could not get back the theatre because the plaintiff was referring to a conspiracy, an unlawful conspiracy.

Was that a contention in the case?

Mr. Hardy: Yes, sir, that is a contention although as defenses those points have been stricken out. Nevertheless it still remains in this case as we shall hope to prove by the facts and establish by the law.

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The Court: You are willing to go this far, that the plaintiff, the Paramount Company, was engaged in a conspiracy, but you are not willing to admit, are you, that Partmar was [25] also a party of that conspiracy?

Mr. Hardy: I am willing to admit they were engaged in the conspiracy but I contend that so far as this tenant was concerned, this tenancy and the serving of that tenant pictures, was not a part of the conspiracy. [26]

* * *

The Court: Are you going to confine your opening statement to the question of the unlawful detainer action?

Mr. Chance: Yes, your Honor. I am glad you asked that question. I have spoken to Mr. Hardy about that at the recess and told him I had outlined my opening statement so that it would cover only this first case that was set by Judge Mathes for the first trial on the unlawful detainer, and I shall not go into the damage issue, nor into the counter-claim issue, which are the second and third trials, but I shall reserve the right to make an opening statement after Mr. Hardy has made his opening statement on the counter-claim at a [36] later time in this trial, when we get down to that issue which, I take it, will be after the Thanksgiving recess.

I take it Mr. Hardy is not in disagreement with that procedure. [37]

* * *

November 9, 1950

Mr. Chance: I agree with that, your Honor, and

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I agree that under Judge Mathes' ruling on the counter-claims where he denied the plaintiff's motion to dismiss those counter-claims, and in effect ruled that the counter-claims had to go to trial, that that is a ruling that we are going to follow here and we are ready at the proper time in the subsequent second trial of this case, the subsequent trial under the order of Judge Mathes, we are prepared to defend those counter-claims with evidence in due course. [86]

* * *

And then, of course, it was on the basis, I believe, of Judge Mathes' ruling in striking out these affirmative defenses, but in holding that the counterclaims nevertheless had to go to trial, that Judge Mathes made his order of April 26, 1948, in setting this case for trial, that separate trials had to be had or would take place, first, on the plaintiff's first, second and fifth causes of action of the complaint for unlawful detainer and declaratory relief and then at the conclusion of that trial to try the issue of damages on the plaintiff's unlawful detainer case and then at the conclusion of that to go forward with the trial on the defendants' alleged counterclaim.

Now, your Honor may want to read, if he hasn't already done so, that order of Judge Mathes dated April 26, 1948, which is in the file, and which set the case for those [87] separate trials.

There is a discussion in the reporter's transcript of the hearing before Judge Mathes on April 26, 1948, ordering the separate trials and I believe that both sides, counsel for both sides, your Honor, have

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prepared their cases in pursuance of Judge Mathes' order of April 26, 1948, so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these separate trials. My opening statement, therefore, related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that counsel for the defendants are preparing their presentation and their statements accordingly. [88]

* * *

The Supreme Court said that franchises are not illegal per se, clearance is not illegal per se, and one or two other items.

I think, probably, the only thing as to which it did not make that kind of reservation was with regard to admission prices. Even there, it made a reservation, which I think applies to this case as it is being presented by the plaintiff here. The question was raised as to whether one contract containing price-fixing provisions was illegal. The Supreme Court said that is academic. Why? Why was it academic?

Because that case didn't present one contract of that kind. It presented thousands of contracts, a nationwide conspiratorial scheme that had been applied to this great trade of motion pictures. [182]

As I gather from what has been said here, this

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court is being asked to consider this contract to be illegal within its four corners. [183]

* * *

Mr. Chance: I think it might be helpful if I were to sketch our thoughts here. We would like to get right down to brass tacks on it.

The Court: All right. Go ahead. [185]

Mr. Chance: I do think it might be profitable. I will pass over it as rapidly as possible. I would like to call your Honor's attention to my trial brief at pages 26 to 28, trial brief No. 1. Would your Honor look at 26 to 28? You will observe at the bottom of the page we discuss in summary form the detail of the minimum admission prices, referring to the paragraph of the franchise agreement which sets forth the admission prices which Partmar must charge, and the remedies which are accorded to the licensor in the event the licensee fails to comply with the minimum admission prices.

We call to your Honor's attention that counsel for Partmar itself has asserted in this very case the invalidity of this minimum admission prices provision in the film franchise agreement before your Honor, with regard to the minimum admission prices, and that is contained in paragraph 2 of defendant Partmar's concise statement of facts, as claimed by defendants, which is in this trial before your Honor.

In other words, there is a positive position taken, which would seem to eliminate the necessity for much argument, since there is a statement in writing in their statement of facts claimed by Partmar

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and Fanchon & Marco. I call your Honor's attention particularly to that.

The portion of the opinion in U. S. v. Paramount is quoted from on pages 27 and 28 with regard to why they found these minimum admission prices to be invalid. [186]

The Court: I might say I have already read your pretrial memorandum and I will probably read it a good many times during the course of this trial. There is no need, I think, to reread that memorandum.

Mr. Chance: Your Honor, may I point out that in answer to Mr. Hardy's last contention that he made just before he sat down a moment ago, where he said it was not necessary to consider, the court stated they would not consider a minimum admission price in a single license agreement, but that they were only considering the overall picture—might I call your Honor's attention to the quotation from the Supreme Court, lines 21 to 24, on page 27 of my memorandum, where the court said:

> "Nor can the result be different when we come to the vertical conspiracy between each distributor defendant and his licensees."

That is talking about the individual, and I think this Supreme Court passed upon that point precisely.

Your Honor, I call your attention to the fact that Mr. Hardy took the position in oral argument before Judge Mathes that this minimum admission prices in the franchise now before the court was

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enjoined as being illegal, as set out in the reporter's transcript of June 2, 1949.

Now, your Honor, I don't want to go contrary to your wishes in regard to the trial brief, but I would like, if your [187] Honor would permit me, to call attention on the second ground of the inflexible clearance and run provision which is the thing your Honor has to hear the evidence about, which I have outlined in some detail, starting at the bottom of page 28 and over through page 34. I have quoted in that part the various provisions with reference to unreasonable clearance, what the rules are that have to be complied with, and particularly may I call particular attention, your Honor, to the footnote 7 in 334 U. S., which I have quoted on page 32 at the top. [188]

It is at the top of page 32, your Honor, footnote 7, and it is so precise and I am relying upon that very heavily as the evidence will go forward in this case, because it fits this situation like a glove.

The Supreme Court referred to the District Court's finding as follows:

> "Some licenses granted a clearance to sell to all theatres which the exhibitor party to the contract might hereafter own, lease, control, manage or operate against all theatres in the immediate vicinity of the exhibitor's theatres thereafter erected or opened.
>
> "The purpose of this type of clearance agreement was to fix the run and clearance status of any theatre thereafter opened, not on the basis of its appointments, size, location and other

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competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

And the evidence that will come in, your Honor, will show that the '38-'39 clearance given or accorded to the downtown theatres, which is the clearance that this franchise fixes, is inflexible and covers a period of 13 years and an area of 450 square miles and the hundreds of theatres with the 21-day clearance and 7-day clearance and so on. That does not give allowance in any way whatsoever to the new theatres that [189] have since been constructed and we are going to introduce evidence to your Honor of a number of new theatres that have come to us and made demand and have put pressure on us that the clearance accorded in 1938-1939 as to their new theatres was unreasonable and the position that Paramount has been placed in with regard to, particularly those new theatres because they are the ones that create the extreme difficulty of trying to live under what we deem to be an invalid franchise.

So, I would call your Honor's special attention to that footnote 7, but in addition, of course, to the factors that have to be considered by the distributor as to whether the clearance is reasonable or unreasonable; and particularly, your Honor, to the statements in the several opinions that you can't have clearance which is for too long a period of time—in this case 13 years—nor can it cover too great an area—in this case 450 square miles, because if it is

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too long a time or too great an area then it isn't reasonably necessary for the protection of the licensee and it becomes an unreasonable type of clearance and that is the thing that your Honor will no doubt desire to pass upon.

Then the third feature, your Honor, of the detail of this franchise agreement, which we think is important, if not more important than any other feature in determining whether it is valid or invalid, and whether or not the [190] invalidity goes to the essence and is non-severable from the balance, is this provision which requires exclusive exhibition by Partmar of Paramount feature pictures for at least 46 weeks out of every 52 weeks of every year of this 13-year term. And in that regard, your Honor, we get into the conditioning—that you can't condition the license of one film upon the taking of licenses for two or more films.

Of course the important part here is—that is on page 43, your Honor. Will your Honor make note of this. On page 43, the bottom of page 42 and all of pages 43, 44, 45 and 46. There we set out the record in which counsel for Partmar have contended in writing before the New York District Court in 87273, that that 46-week exclusive dealing provision is illegal. That was asserted in the briefs filed in the Supreme Court, which we shall introduce into the record in due course. So, taking the defendant Partmar's own statement and own position with reference to this conditioning or anti-block booking or exclusive dealing, whichever you want to term it, they have asserted of record that that is illegal and

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they are borne out in that respect by the portion of the Supreme Court decision which I have set out at the bottom of page 33.1 and the top of page 34.

So, I would like your Honor particularly to have in mind the position which the defendant Partmar Corporation, or its chief counsel, has taken of record on this very provision of [191] this film franchise agreement now before your Honor.

Then the fourth point that is involved for your Honor's consideration, we have briefed at the bottom of page 34 through the top of 37.1, which is at the bottom of page 34, your Honor, which is the question as to whether a franchise to Partmar, a part of the Fanchon & Marco circuit which has this affiliation with Paramount in the Hollywood Theatre by 50-50 ownership of the corporation which owns the leasehold on that theatre, is an independent within the provision allowing a franchise under limited conditions to an independent to compete with defendants or their affiliates; or whether on the other hand that takes them out of that category, being an independent, and we have set out our views in writing on that fourth point which I would like your Honor to very particularly have in mind. [192]

* * *

November 14, 1950

The Supreme Court has said in this very case, in the Paramount case, that franchises are not unlawful per se and has sent them back to the District Court to get more evidence—to get more facts than were shown in that very voluminous record, to show that they are in restraint of trade if it can be shown.

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In this branch of the law this kind of a contract as it is described in the other opening, I think should be classified as what is known as an "exclusive dealing contract"—that is, a contract either where a seller requires the buyer to deal exclusively with him or conversely where the purchaser requires the seller to deal exclusively with him.

In one case with regard to the buyer it is aimed at his competitors.

If this is an exclusive dealing contract, having an unlawful effect, then it was one designed to and which has actually prevented the use of competitive films in this theatre. Now we will show that it had not any such effect at all. We will show that that is not by any means the meaning of its terms.

It is only when exclusive dealing contracts are a system of such contracts that they have been held to be illegal as in restraint of trade. [265]

By "a system of contracts" I mean contracts more or less on a nationwide scale. Recently there was a typical instance of that kind in this court in the Standard Oil case, in which the Standard Oil Company made contracts with retail dealers requiring them to purchase their goods exclusively from the Standard Oil Company.

In that case there were literally thousands of those contracts over a great trade area.

The contention seems to have been made in that case by the Government that that system, all of those contracts, was violative of the anti-trust laws per se.

This court stated that was not a correct statement of the law. In 76 Fed. Supp. page 863, this court said:

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"As I understand the pleadings and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which by its language and actual effect at shown by the evidence, restricts the stations to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal per se.

"We cannot agree. To the contrary as we read the cases, exclusiveness of outlet is not in itself illegal. It becomes illegal only if it results in a substantial lessening of competition or the creation of monopoly in the line of [266] commerce."

Now, that is what must be shown here with regard to this contract before this court should declare it illegal.

This contract has already been subjected to that test in the Paramount case in New York in an environment of monopoly and restraint of trade and yet the Supreme Court picked contracts of this kind, as they are described by the other side, picked them out of that environment and said:

"These are not illegal per se,"

and it said in effect:

"These are not illegal even in that environment. You must show something else."

In another case that came up from this district the Supreme Court made the same holding with regard or to the effect that an exclusive dealing con-

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tract, a single exclusive dealing contract is not unlawful per se, and that was an exclusive dealing contract applying to transactions of purchase and sale running literally in the millions. That was the case of the United States versus Columbia Steel Company, reported in 334 U. S. at page 495.

In that case the steel company acquired the Consolidated Steel Company. The Supreme Court recognized that that brought about an exclusive dealing contract between United States Steel and its acquired subsidiary.

The Government contended that that acquisition which produced that exclusive dealing situation rendered the [267] transaction unlawful; but the Supreme Court said:

> "Exclusive dealings for rolled steel between Consolidated and United States Steel brought about by vertical integration or otherwise are not illegal, at any rate until the effects of such control is to unreasonably restrict the opportunities of competitors to market their product."

That, of course, is one of the effects that must be shown here in order to condemn this contract standing alone. [268]

* * *

The question that Mr. Hardy urges comes up under his counterclaims, under the trial that will come up subsequently where he claims that the provisions of this franchise agreement were unreasonable and excessive and there your Honor will have to determine whether or not that is true and

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whether or not they are entitled to any relief. But I don't think we ought to lose sight of the issue that is before the court at this time on this first [343] trial.

* * *

I think when you come to the counterclaim stage of this trial Mr. Hardy will offer a letter which he may claim was a request on the part of his client to reduce the prices in 1939 below this schedule that is set up on page 22 of Exhibit 3, but insofar as the prices that were raised for this downtown theatre above this minimum schedule during certain of the years, particularly the war years, I think that the evidence will simply be that Mr. Wolff and Mr. Harry Arthur, the [355] operators of the theatre, on their own behalf and without consultation with Paramount raised the price to what they actually charged. I believe that will be the evidence. [356]

* * *

We offer that for the limited purpose only of showing Paramount as being subject to the injunctive features of the decree entered pursuant to that opinion relating to the franchise provision and relative to minimum admission prices, unreasonable clearances, and conditioning of one film license upon the taking of other film licenses from the same distributor, or block booking.

We do not refer to the opinion for any other purpose. In other words, we refer to it for that limited purpose. [371]

* * *

Mr. Chance: I call to your Honor's attention and

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make reference to, but I do not offer into evidence, the decree of the United States District Court in Equity No. 82,273, entitled United States versus Paramount Pictures, et al., which is reported in 70 Fed. Supp., page 72, and following.

I hand to your Honor for ready convenience but without offering into evidence, a printed copy of the decree which is verbatim of that reported in 70 Fed. Supp., 72 and following, and which has now been marked under the court's order Exhibit 7 for identification.

I do not offer that into evidence. I call the court's attention and make this reference to said decree for the limited purpose of the court considering those portions of that decree pertinent to this case of the unlawful detainer case and the question of the validity or invalidity of the franchise which deals with (a) franchises generally; (b) with minimum admission price provisions; (c) with unreasonable [376] clearance; and (d) with conditions requiring the taking of another or other film licenses or so-called block booking. [377]

* * *

November 15, 1950—10:00 A.M.

The Court: You may proceed.

The Clerk: Paramount Pictures Theatres Corporation versus Partmar Corporation, a corporation, et al.

Mr. Chance: We are ready.

May it please the court, on thinking the matter over last evening I came to the conclusion that I may have wasted a little of your Honor's time late yes-

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terday afternoon in not offering into evidence rather than merely having it marked for identification, the formal decree of December 31, 1946, which is marked as Plaintiff's Exhibit 7 for identification.

So this morning I shall hereby and do offer into evidence for the limited purposes only which I stated in connection with the calling of the decree to your Honor's attention, or making reference to it yesterday afternoon and for those limited purposes only I offer Exhibit 7 for identification into evidence.

The Court: It may be received and so marked.

(The document referred to was marked Plaintiff's Exhibit 7 and received in evidence.)

The Court: Do you want to object now?

Mr. Hardy: I object to the limitation. I think the document should go in as a document in toto—no part of [384] it but the whole thing.

The Court: Well, your objection is overruled. It is before the court and the court would read the decision in any event without it being introduced into evidence.

It is a decision of the court which is binding upon this court. I don't see very much difference whether it is in evidence or not. The objection is [385] overruled.

* * *

Mr. Hardy: If your Honor please, may I add something in that connection? Section 5 of the Clayton Act provides that in a private suit under

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the anti-trust laws relative to the same matters involved in a suit by the government against the same parties, the judgment in a contested case shall be taken by the court as prima facie evidence.

It was because of that section of the statute that I was very interested as to precisely the function and effect of this judgment which is being offered, and I think it is precisely because of that statute that counsel is taking such a fine sight on that judgment and offering it in part and rejecting [389] it in part, and offering it in such a tentative and uncertain fashion. It is because of that statute that I objected to accepting it piecemeal.

Of course, I would love to have that document in this case strictly as a piece of evidence, because I think it would help us tremendously.

The Court: Well, when it comes your turn, if you want to introduce it or make a motion that it be received in toto, you can. [390]

* * *

Now we next offer into evidence a certified copy of the consent decree as to the Paramount defendants, filed March 4, 1949, in the Southern District of New York, in Equity No. 82,273, in the case entitled United States of America versus Paramount Pictures, Inc., et al., defendants, which is a printed copy and certified copy of that decree. We offer this evidence for the same limited purposes which I stated in regard to Exhibit No. 7.

I might state that this has been marked as Exhibit 1 under date of March 15, 1949, on the motions for summary judgment and I would suggest

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that, to keep the record clear, the court direct the clerk to take off that exhibit number [407] and give it the next exhibit number in order in evidence.

The Court: It may be marked Plaintiff's Exhibit 10 in evidence.

(The document referred to was marked Plaintiff's Exhibit 10 and received in [408] evidence.)

* * *

December 5, 1950

GEORGE A. SMITH

having been previously duly sworn, resumed the stand and testified further as follows:

* * *

Cross-Examination

By Mr. Hardy:

Q. Have you some plans about selling your pictures to a new tenant of that theatre if this one shall be evicted?

Mr. Chance: Object to that as being immaterial.

The Court: Sustained. I know, Mr. Hardy, you made a statement in one of your opening speeches to the effect that Paramount wanted to get out Partmar so they could give the theatre to some other organization, but I don't know whether that is material in this case. Why is it?

The question is whether or not they have a right to terminate the lease. If they have a right to ter-

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(Testimony of George A. Smith.)

minate the lease, then they have a right to give the theatre to anyone they want, don't they?

Mr. Hardy: Well, if your Honor please, on the theory on which this case is evidently being tried, it is an anti-trust case. I am prepared to submit authorities to your Honor to show the scope of such an inquiry cannot be confined to the four corners of this contract, and I am prepared to show, and I think we shall succeed before this is over, that this lawsuit, this attempt to evict this tenant, is an act in pursuance of a conspiracy to monopolize and restrain the motion picture business in this city despite the decree of the New York court.

These two companies, this film company and this theatre company, have been required by a judgment to divorce themselves completely, to be strangers commercially. Honestly and [875] sincerely and, as a matter of fact, we have that landlord, who is supposed to be separated from that company, bringing this gentleman to this courtroom to assist them to evict us.

Now, legitimately, his company can have no interest in evicting this tenant, but here we have them doing it.

The Court: Mr. Hardy, this is an unlawful detainer action and I don't believe that the plaintiff in this case in order to sustain the right to terminate the lease can be permitted to rely on something that happened after the notice of termination. In other words, he gives notice of termination and then comes in and says a year after something hap-

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(Testimony of George A. Smith.)

pened that will give us authority to terminate the lease, and I don't think that is possible.

Now you are going to be restricted to the things that occurred prior to and up to the date of the termination, and I don't see how you are going to be able to bring in anything that happened afterwards to bolster up or help your case.

If that is true, as far as the plaintiff is concerned, on anything that happened subsequent to the notice, I don't think it is material.

You say some time in the future, not now, but some time in the future they are planning to give this theatre to somebody else. I don't know.

It seems to me that if the plaintiff cannot rely upon anything that happened after the notice of termination, that [876] the defendant can't rely on anything that happened after the notice of termination or anything that is going to happen.

The question before this court, as far as the franchise agreement is concerned, is whether or not that agreement tends to monopolize the motion picture business here in Los Angeles. That is restricted, I think, to the time of the notice of termination of the contract, the termination of the lease, and not what is going to happen in the future.

Mr. Hardy: Well, your Honor's statement pleases me very much, but you haven't made a ruling that has cut this case down to that size.

The Court: I am getting ready to make one now. [877]

* * *

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(Testimony of George A. Smith.)

Mr. Hardy: I am trying to establish that it is valid. I am trying to establish that none of the restraints and monopoly conditions that have existed here can be traced to this contract, to the terms of this contract. That all of the restraints and monopoly conditions that exist here exist because of the conspiratorial arrangement between Paramount and Fox West Coast principally. [1077]

* * *

The Court: It seems to me, Mr. Hardy, that if there is a monopoly here Partmar has the monopoly. Partmar has the privileged position here in this community. They are the ones who have the theatres and they are the ones who show the pictures first. Not only that, but according to the theories advanced here, they are precluding the other theatres from showing those pictures until Partmar can show them first. So Partmar has the monopoly. [1083]

* * *

December 7, 1950

GEORGE A. SMITH

Cross-Examination
(Resumed)

* * *

The Court: In establishing these clearances for Paramount, at any time did you work in conjunction with any other major studios, such as Warner Bros., 20th Century-Fox?

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(Testimony of George A. Smith.)

The Witness: You mean distributors, your Honor?

The Court: Distributors.

The Witness: No, sir, we haven't.

The Court: In other words, your clearance was a clearance only for Paramount?

The Witness: That's right, sir.

The Court: And you disregarded any clearance for any other distributors?

The Witness: Completely in making any decision, yes, sir. We act on our own responsibility.

The Court: May I ask, Mr. Hardy, is there going to be any evidence to show that Paramount in conjunction with any other distributor, say Fox-20th Century or Warner Bros., got together and conspired to make these different clearances among the different localities?

Mr. Hardy: I think there will be some evidence to that effect.

The Court: There will be?

Mr. Hardy: Yes, sir.

The Court: All right. [1188]

Mr. Hardy: I say I think so. I am not sure. I think we may introduce that.

The Court: Mr. Smith said that there wasn't, so I was just wondering if there was going to be any evidence to the contrary.

Mr. Hardy: There is already evidence in this case to that effect. I understand they put the findings of fact in the government's case in here and the findings of fact find that that was done.

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(Testimony of George A. Smith.)

Mr. Chance: We have not put any findings of fact in.

Mr. Hardy: You have not?

Mr. Chance: No, sir. They are not admissible.

Mr. Hardy: The findings of fact in that case were to that effect.

The Court: There is nothing in this case so far, as far as I know, to show Paramount got together with any other distributor and attempted to divide up the territory or attempted to divide up the theatres, or attempted to divide up the clearances. In other words, if Paramount went down to Loyola Theatre, they did not go into the Loyola Theatre together with Warner Bros. or with RKO and say, "Now, we will take Loyola and you can have some other theatre, and we will give all these theatres a 21-day clearance." [1189]

* * *

December 12, 1950

The Court: So far as this case, there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.

The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy. It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspir-

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acy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. [1424]

* * *

Mr. Hardy: No, no; that is what they say and we may assume, at least for the moment, that it was true, that it was because of the physical characteristics of that theatre and not because of the contract. But even at that we come back to our contention even if it was an exclusive first run it was merely permissible.

There are many cases under the anti-trust laws dealing with exclusive dealing contracts. I think your Honor will find that they all have certain elements in them. One of the elements, one of the indispensable elements will be this, that the seller who sells his goods or leases his wares on contracts requiring the lessee or the buyer to deal with him exclusively, has a very dominant position in his industry— [1579] that he represents 50 or more per cent of the supply. And the next element is that he has a system of such contracts—that is to say he is selling to a great number of buyers who represent a very substantial part of the market and he has the same contracts with all of them.

Now, the courts have said, and this court perhaps in the most recent case which has gone to the Supreme Court, the Standard Oil case, which dealt with its contracts with gasoline stations, said that

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there must be something in addition tothat—in addition to the dominant position of the vendor, in addition to the system, widespread system of such contracts. There must be shown a factual result from that and that must be a substantial restraint of trade, a substantial effect upon the market.

If you undertake to apply those exclusive dealing cases, which I think control here, you will see at once a vast distinction between the facts in those cases and the facts here.

You have here one contract. Let us call it an exclusive dealing contract—exclusive right up to the hilt. You have one contract.

Now, it happens that there is a precedent with regard to this contract and similar contracts. To me it is not merely a persuasive precedent but it is a decision of the New York court and a decision of the Supreme Court right on the head of this franchise. It is right on the nose. And [1580] it says that these franchises on this record are not illegal. If you find these contracts illegal you must find something more than is shown in this case.

I think two of the reasons why the Supreme Court said that was because—take Paramount for instance. Paramount alone with regard to the supply of pictures, which it produces, is not a dominant factor in this industry. Paramount alone cannot control or seriously affect the supply of pictures unless it operates or associates itself in that regard with other film companies. But take Paramount alone. I don't know what percentage it represents, but I think it is well below 20 per cent. It

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does not have the dominating position that we find in the other exclusive dealing contract cases.

Secondly, it does not have the system of such contracts. I think in the case that went to the Supreme Court there were four so-called franchises that Paramount had. Only four. And this was one of them and I think the Hollywood franchise was another. So that you see the Supreme Court was really talking about these particular franchises—had really decided that in conjunction with that the Supreme Court laid down a rule about franchises and it said franchises "are not unlawful per [1581] se."

* * *

December 14, 1950

HARRY C. ARTHUR, JR.

the witness on the stand at the time of recess, having been first duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Chance:

* * *

Q. And would you say that one of the things that has brought you to the conclusion that a recasting of clearances in this whole area would be in order as against what the clearances were some 10 years ago, the fact that we have had this tremendous growth of population in these various areas, in-

(Testimony of Harry C. Arthur, Jr.)

cluding the area down around Inglewood and the area around Baldwin Hills and so on?

A. No. I would say that the reason for the recasting of the clearances is because they have given all the advantages to Fox West Coast and there should be an equality in the entire area between all theatres. [1791]

* * *

Q. For how long a period has that continued of Cabart having half of Warner's, half of Universal, and the Columbia and Republic you mentioned?

A. Quite some time.

Q. Over the last 10 years, say, Mr. Arthur?

A. Maybe not that long.

Q. Approximately?

A. Yes, it could be.

Q. It could be?

A. Certainly it was over seven.

Q. Somewhere between seven and 10 years that has continued? A. Yes, I think so.

Q. When, if at all, was the first time that any one of these Cabart theatres in Long Beach first-run houses commenced to show Warner feature pictures on a day and date basis with the Warner's Downtown, Hollywood and Wiltern?

Mr. Hardy: I object to that.

The Court: On what ground?

Mr. Hardy: It is irrelevant.

The Court: Overruled. [1903]

* * *

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December 19, 1950

The Court: Well, Mr. Hardy, if you are successful in proving—I think you have tried not to prove—but if you are successful in proving that this franchise agreement was an unreasonable restraint-of-trade agreement, then I am going to probably have to find that the Paramount people were justified in terminating the franchise agreement and the lease. You have attempted, and you have argued all along, to show that the franchise agreement and the actions of the parties under the franchise agreement were not an unreasonable restraint of trade. That has been your whole philosophy. Otherwise, you and Mr. Chance could get together and stipulate here you had a document that had been unreasonable and the document could be terminated, and then we could come to the question of the rights of the parties as to damages. But if you are successful in establishing, or if Mr. Chance is successful [2133] in establishing that we have a condition here that was an unreasonable restraint of trade, then I think I am going to have to find, as a matter of law, that Paramount was entitled to terminate its lease. [2134]

* * *

December 20, 1950

So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. This is the first time that there has been any offer to show any connection at all between Paramount and an

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exhibitor, that is, the refusal to open up first runs on the ground that there was an arrangement with Fox West Coast.

If there is a conspiracy, as I said, if the parties have gotten together, all the producers and all the exhibitors have got together and fixed prices, divided up the prices, determined who should have first run, the second run, and so forth, that would be an entirely different situation than we have here at bar [2260]

* * *

June 18, 1951

Mr. Gamble: The objection that we have, your Honor, primarily, is this case as decided by the court was an unlawful detainer case, and in the determination of the case all that was necessary was to find that they had no reasonable grounds for terminating the lease. And, actually, these other facts as to the block booking, the price fixing, and so forth, if the court found that that contract was a valid contract in itself, then they had no justifiable reason for terminating the lease. That is actually all the case boils down to. The rest of it is opinion of the court which was [4*] well expressed and which was probably necessary.

The Court: What are you going to do about your counter-claims?

Mr. Gamble: That is the only thing that we are really worried about, and that is this: In the opinion it is set forth just exactly what happened, that it was stipulated that those matters would not be

* Page numbering appearing at top of page of original Reporter's Transcript.

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tried and there would be no evidence as to the conspiracy.

The Court: That is true, but all your counterclaim is based upon a question of conspiracy, and if you can't establish conspiracy, I don't know how you can recover.

Mr. Gamble: The burden was never on the defendant to establish the conspiracy in this trial. The plaintiff never introduced any evidence of conspiracy. They introduced evidence of the illegality of the contract itself. In an anti-trust case it isn't even necessary to have a contract, and consequently there can be other evidence outside of the contract which would show the conspiracy.

Now, the plaintiffs never introduced any, and by the stipulation of the court, or by the stipulation of the parties and the ruling of the court, it was not our burden to establish our counter-claim at that time and introduce evidence.

The Court: Mr. Hardy definitely argued with me that at most—these are his words—that at most this was a [5] contract between one producer, one theatre. He emphasized the "one" time after time. He emphasized that no other parties were interested, and it is just one contract between one producer or one distributor and one exhibitor.

Mr. Gamble: That is true, your Honor, and, as far as that contract is concerned, it could be between one producer and one exhibitor. But that doesn't mean that outside of that contract that there were other producers and other exhibitors that were entering into conspiracy to make thas contract be-

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tween the one exhibitor and the one producer. Now, it is true——

The Court: You had an opportunity, and I thought you went into the matter very thoroughly, to try to show what the effect of this so-called franchise agreement was upon other exhibitors. You weren't limited as to time. You spent lots of time up here trying to establish the facts.

Mr. Gamble: That is true, but we didn't try to establish conspiracy, because conspiracy wasn't part of our cases. Ours was a defensse of an unlawful detainer suit. It was not the conspiracy, because our conspiracy, to allow recovery on the counter-claims, was something outside of the unlawful detainer suit, and consequently there was no burden upon us to show it. And the plaintiffs did not assume any burden to show illegality of this contract by reason of any conspiracy.

The Court: If you had just come in and defended upon [6] the unlawful detainer suit and made that the only issue, yes. But you didn't. You enlarged the issue. You not only said, "Why, this is an unlawful detainer action and the plaintiff is not entitled to his theatre back," but you went on to say, "That there was a conspiracy, and as a consesquence we are entitled to damages."

Mr. Gamble: In our counter-claim, yes. And there was no hearing; the trials were separated. The first was the trial of the unlawful detainer. And, as your Honor sets forth in the opinion, "At the time of trial it was agreed that action on the counter-claims should be postponed until after the

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trial of the main issue involved, * * *" That was the unlawful detainer.

The Court: But I go back to your own pleadings and say, "becauses there was a conspiracy." And we have found there was no conspiracy.

Mr. Gamble: Was it necessary for us to introduce evidence of the conspiracy when there was another perfectly good defense which your Honor found? And, consequently, the burden of proof was not on us, as it would be on our counter-claims, to prove the conspiracy.

The Court: I don't think we can try these cases piecemeal. We have got to have the evidence.

As far as I know, all the evidence was in relative to the conspiracy. [7]

Mr. Gamble: Not on the counter-claim. They were specifically designated to be tried piecemeal.

Your Honor, this is the situation: Plaintiff on its case proved, first, notices and their being enjoined by the order of the New York court, and your Honor found that they were not enjoined, and that the other matters which they raised as to the illegality of the contract were not valid. The court specifically found that. Now, no point was raised by the plaintiffs that there was a conspiracy which invalidated this contract.

Here we had a contract, for instance, to make it a pure example, between the clerk and me, but your Honor and Mr. Chance and Mr. Potter are conspiring to make Mr. Clerk and me enter into a contract. Now, it was determined or is determined by the judgment of this court that the contract

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between Mr. Clerk and me was a perfectly valid contract between ourselves. Now, under the Sherman Anti-trust, if there is a conspiracy outside of that contract, that contract may be part of an illegal conspiracy which may entitle either one of us to damages.

Now, there was no issue of that conspiracy outside of the contract raised by the plaintiffs in this case. They said the terms of the contract themselves show a violation of the Sherman Act. And the court disagreed with them on that.

Now, the burden would be on us on the trial of our [8] counter-claims to show that despite the apparent legality of that contract that there was a conspiracy outside of the contract which by reason of the conspiracy entitled us to damages.

In other words, we were forced into a position in signing this contract between the two of us which was an onerous and burdensome contract, and the conspiracy outside resulted in this contract.

The Court: I don't agree with you. I just disagree with you.

* * *

[Endorsed]: Filed July 30, 1951. [9]

PLAINTIFFS' EXHIBIT No. 1

This Indenture of Lease (sometimes hereinafter referred to as "Lease"), made and entered into as of the 1st day of January, 1939 (but actually executed and delivered on the 30th day of August,

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Plaintiffs' Exhibit No. 1—(Continued)

1939), by and between Paramount Pictures, Inc., a corporation organized and existing under the laws of the State of New York and duly qualified to do business in the State of California, party of the first part, hereinafter called "Lessor," and Partmar Corporation, a corporation organized and existing under the laws of the State of California, party of the second part, hereinafter called "Lessee,"

Witnesseth:

That Lessor, in consideration of the rents herein reserved and of the terms, covenants, conditions and agreements herein contained on the part of Lessee to be kept, performed and fulfilled, has demised and leased to Lessee, and Lessee has hired and taken from Lessor, the theatre portion of the building now known as the Paramount Theatre Building, located on the Northeast corner of Sixth and Hill Streets, in the City of Los Angeles, County of Los Angeles, State of California, the land upon which said building is erected being more particularly described as follows:—

> Lots Six (6) and Seven (7) in Block Fourteen (14) or Ord's Survey, as per Map thereof recorded in Book 53 at pages 66 et seq., Miscellaneous Records of said County of Los Angeles, excepting therefrom that portion of said Lots, being approximately the Easterly ten (10) feet thereof, that has been taken for alley purposes;

together with all exits, entrances and appurtenant

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Plaintiffs' Exhibit No. 1—(Continued)

passageways and courtways and all easements for light or air in connection therewith.

To Have And To Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 31st day of August, 1949, unless said term shall be sooner terminated as hereinafter set forth.

Article I.

Furnishings and Equipment

Lessee shall have the right, from time to time, to cause to be installed in the demised premises, at its sole cost and expense, such furnishings and equipment as it may see fit and the further right to remove, change or exchange same, provided it be not in default under this lease and the installation be without cost or expense to Lessor.

All such furnishings and equipment so installed by Lessee, and any and all replacements and substitutions therefor, shall be and remain personal property and the property of Lessee or Lessee's licensees, as the case may be, notwithstanding any part or portion thereof be or become incorporated in the building of which the demised premises are a part. Lessee shall not remove or replace any article belonging to Lessor, now installed in said premises, without having first obtained Lessor's

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Plaintiffs' Exhibit No. 1—(Continued)

written consent thereto, and if Lessor shall consent to any such removal or replacements title to the substituted articles and any and all subsequent replacements thereof shall vest and remain at all times in Lessor, it being further agreed that any article substituted by Lessee shall have a value, at the time of substitution, at least equal to that of the article removed and replaced.

Article II.

Rent

As rental hereunder Lessee shall pay to Lessor the following sums in the manner following:—

(a) For and during the eight (8) calendar months from January 1, 1939, to August 31, 1939, a fixed weekly rent of Two Thousand Two Hundred Dollars ($2,200.), for each lease week, payable in advance, on the first day of each and every such week, commencing on the date of the actual execution and delivery hereof, and a pro rata of Two Thousand Two Hundred Dollars ($2,200.), as the fixed rent for any number of days less than a full week, payable in advance, on the first of said days, (it being understood that the amounts heretofore paid for the period from January 1, 1939, up to the date of the actual execution and delivery hereof as and for rent of the demised premises for such period pursuant to the Indenture of Sublease dated as of October 17, 1935, between Paramount Properties Incorporated, as lessor, and Partmar Cor-

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Plaintiffs' Exhibit No. 1—(Continued)

poration, as lessee, shall be deemed to have been paid as part of the fixed weekly rent payments hereunder for such period, and that, notwithstanding any other provision of this lease, the entire amount of the fixed weekly rent payable hereunder for such period remaining unpaid prior to the date of the actual execution and delivery of this lease shall be paid by Lessee in installments of One Hundred and Fifty Dollars ($150), per week, commencing on the first day of the lease week immediately following such last-mentioned date, it being agreed that if Lessee shall make default in the payment of any such installment when due, and such default shall continue for a period of two (2) days after written notice thereof from Lessor, the entire amount of the then remaining unpaid balance of the fixed weekly rent for such period shall forthwith become due and payable); and should a sum equivalent to the total of:

(i) fifteen per cent (15%) of the "gross receipts," as such term is hereinafter defined, during the portion of such eight (8) calendar months that the theatre in the demised premises shall be operated on a "straight picture policy," as such term is hereinafter defined, plus

(ii) twelve and one-half per cent (12½%) of the "gross receipts," during the portion of such eight (8) calendar months that the theatre in the demised premises shall be operated on a "stage show policy," as such term is hereinafter defined,

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Plaintiffs' Exhibit No. 1—(Continued)

exceed the aggregate amount of the fixed rental payable during said eight (8) calendar months, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for said eight (8) calendar months, payable September 15, 1939.

(b) For and during each period of twelve (12) calendar months from September 1st to August 31st thereafter (each such period being herein sometimes referred to as a "lease year"), a fixed weekly rental of Two Thousand Two Hundred Dollars ($2,200.) for each lease week, payable in advance, on the first day of each and every such week, commencing on September 1st of each lease year, and pro rata of Two Thousand Two Hundred Dollars ($2,200) as the fixed rent for any number of days less than a full week, payable in advance, on the first of said days, and should a sum equivalent to the total of:

(i) fifteen per cent (15%) of the "gross receipts" during the portion of such twelve (12) calendar months that the theatre in the demised premises shall be operated on a "straight picture policy," plus

(ii) twelve and one-half per cent. (12½%) of the "gross receipts" during the portion of such twelve calendar months that the theatre in the demised premises shall be operated on a "stage show policy,"

exceed the aggregate amount of the fixed rent pay-

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Plaintiffs' Exhibit No. 1—(Continued)

able during such twelve (12) calendar months, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for such twelve (12) months, payable on the 15th day of September immediately following such twelve (12) calendar months.

(c) Such other sums payable, at option of Lessor or otherwise, as rent, as in this lease set forth and provided.

The foregoing rental and all sums which are to be paid or repaid by Lessee to Lessor shall be paid in lawful money of the United States of America to the agent of Lessor located in the building of which the demised premises are a part, or to such other person as Lessor may, be written notice, hereafter designate. All rentals and other sums to be paid or repaid to Lessor shall bear interest at the legal rate from the time when payable hereunder.

The term "gross receipts," as used herein, is intended and shall always be construed to mean: (a) the gross admission receipts derived from the operation of the demised premises; (b) also such sums as may be derived by Lessee from the granting of any concessions, privileges, or rights for the sale of any one or more articles, whether by human agency, automatic vending machine or otherwise, in any part of said premises, or for the use of any of the facilities thereof, including, but not by way of limitation, program, screen and curtain advertising,

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Plaintiffs' Exhibit No. 1—(Continued)

or from any other business that may be conducted in or on the said premises by authority of Lessee; and (c) should Lessee conduct or handle one or more of the matters or things referred to in "(b)" hereof, then and in such event, the profits therefrom derived by Lessee, which profits shall be deemed to be the gross receipts therefrom less the actual cost to Lessee of such articles or facilities, which cost shall include only such salaries, if any, as shall be paid to personnel employed for the purpose of and exclusively handling such sales or facilities.

The term "straight picture policy," as used herein, is intended and shall always be construed to mean the operation of the theatre in the demised premises with a program of entertainment consisting either exclusively of motion picture projections, with or without sound, or of such motion picture projections in conjunction with other theatrical exhibitions or forms of entertainment performed by living persons on the stage requiring less than thirty (30) consecutive minutes in the aggregate for presentation at each performance or an actual aggregate expenditure of less than Four Thousand Five Hundred Dollars ($4,500) per week for expenses directly incurred in connection with such theatrical exhibitions.

The term "stage show policy," as used herein, is intended and shall always be construed to mean the operation of the theatre in the demised premises with a program of entertainment including, in con-

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Plaintiffs' Exhibit No. 1—(Continued)

junction with at least one (1) feature motion picture projection, either vaudeville, dramatic, operatic, orchestral, instrumental or vocal ensemble or other forms of theatrical exhibitions requiring the appearance of living persons on the stage or in any combinations of such theatrical exhibitions, which theatrical exhibitions, other than motion picture projections, shall require at least thirty (30) consecutive minutes in the aggregate for presentation at each performance, and shall require an actual aggregate expenditure at the rate of not less than Four Thousand Five Hundred ($4,500) per week for performers, stage hands, orchestra and other expenses necessarily and directly incurred in good faith in connection therewith.

Lessee shall, and Lessee covenants and agrees that it will, at its sole cost and expense, cause the hereinafter referred to audits showing "gross receipts" to be made, and deliver to Lessor a certified copy of each not later than the respective hereinafter fixed date. Each of such audits shall show the "gross receipts" for the period thereby covered properly segregated into two groups showing the respective portions thereof derived from operations under a "straight picture policy" and derived from operations under a "stage show policy," and shall also show in detail all income and receipts other than from admissions derived by Lessee from the operation of the demised premises and the respective sources thereof, and, if any deductions shall be made from such other income and receipts, the

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Plaintiffs' Exhibit No. 1—(Continued)

details of such deductions. The first of such audits, which shall be furnished on or before September 15, 1939, shall cover the twelve (12) month period of time commencing September 1, 1938, and ending August 31, 1939, and shall include the unexpired four (4) month period of the term demised and subleased by the Indenture of Sublease dated as of October 17, 1935, between Paramount Properties Incorporated, as lessor, and Partmar Corporation, as lessee, remaining prior to the termination and cancellation of said Indenture of Sublease hereinafter provided for in Article XXIV hereof. The remaining audits shall be furnished on or before the 15th day of September of each subsequent lease year, commencing on or before September 15, 1940, and each thereof shall respectively cover the immediately preceding twelve (12) month period of time, commencing with September 1st of the preceding calendar year and ending with August 31st of the same calendar year within which such respective audit is to be furnished.

Each of the hereinabove referred to audits shall be made by a certified public accountant or firm of certified public accountants acceptable to Lessor, and shall be accompanied by a certificate showing that the following has been done in detail by such certified public accountant or firm of certified public accountants in connection with such audit for the entire period covered thereby:

(1) That the income from admissions receipts,

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Plaintiffs' Exhibit No. 1—(Continued)

as shown by the daily box office reports (each of which Lessee hereby agrees shall be signed by the theatre manager and countersigned by an officer of Lessee), were checked to the relative entries in the cash receipts book and that the footings of the latter record were checked; that the total cash bank deposits per daily box office reports were compared with duplicate deposit slips signed by the banks and to the periodic bank statements furnished to Lessee;

(2) That the admissions receipts, by weeks, as recorded in the cash receipts book were separately listed and that the total thereof was reconciled with the relative income account reflected in the operating ledger, general ledger or other appropriate account book maintained by Lessee;

(3) That the daily continuity of ticket numbers was accounted for and the relative extension in respect of the income derived therefrom were checked and compared with the theatre cash receipts book;

(4) That the clerical accuracy of the box office reports was checked and verified;

(5) That any and all refunds shown by the daily box office reports were verified; and

(6) That all gross receipts other than from admissions were verified in detail, and that all deductions from such gross receipts other than from admissions were verified by reference to paid invoices and cancelled checks.

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Plaintiffs' Exhibit No. 1—(Continued)

Lessee shall, within two (2) days after the delivery of a certified copy of each of the hereinabove referred to audits, pay to Lessor any percentage rent which shall have accrued to Lessor under the hereinbefore applicable rental provision of this Article for the period of time covered by the audit. If Lessor shall express its dissatisfaction concerning the audit's accuracy, Lessor shall have the right to make a second audit at its own expense, and if Lessor and Lessee be then unable to compose and adjust their differences within a reasonable time after the second audit shall have been completed, a third audit shall be made by Messrs, Price Waterhouse and Company, certified public accountants, or other mutually satisfactory firm of certified public accountants of equal standing, the expense of which shall be borne equally by Lessor and Lessee, and the amount of the percentage rent, if any, shall be ascertained by using the figures representing the amount of the "gross receipts" shown on the third audit as the base for the computation, and a final cash adjustment and settlement of the percentage rent shall be made within ten (10) days after the completion of the audit. If two audits shall have been had and Lessor and Lessee compose and adjust their differences without a third, a final cash adjustment and settlement of the percentage rent shall be made within ten (10) days after Lessor and Lessee shall have reached an accord. Should this lease be terminated prior to the expiration of the period of time to be covered by any herein-

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Plaintiffs' Exhibit No. 1—(Continued)

above referred to audit, the adjustment of the percentage rent for such part or portion of the demised term shall be had under the arrangement herein provided with respect to an audit for a full period, except that the certified copy thereof shall be delivered to Lessor within fifteen (15) days after the termination of the lease.

It is further understood and agreed: (a) that should the fixed rent for the first eight (8) months of the demised term, or for any subsequent lease year, exceed a sum equivalent to the respective percentages of the "gross receipts" hereinabove specified, the excess shall not be carried over to any other period for the purpose of reducing the amount of the percentage rent payable by Lessee to Lessor under the terms and provisions of this lease for such other period; (b) that the amount of the percentage rent to be paid by Lessee to Lessor, although based upon respective percentages of the "gross receipts," is so much additional rent for the use of the demised premises, and no such payment is intended to, nor shall the same ever, change the relationship of the parties hereto from that of Lessor and Lessee to that of either co-partners joint adventurers, or associates in the conduct of Lessee's business or the latter's operation of the demised premises; and (c) that Lessor shall not be liable for any of the debts incurred by Lessee in connection with the conduct of Lessee's business and/or the operation of the demised premises.

Lessee further covenants and agrees that it will

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Plaintiffs' Exhibit No. 1—(Continued)

keep separate, true and accurate records of the hereinbefore referred to "gross receipts" with respect to the operations on the demised premises, under a separate system of bookkeeping and accounting installed and maintained in accordance with good accounting practice, and that Lessor, through its officers, agents and employees, shall have access at all reasonable times, to the books, accounts, records, supporting vouchers, papers, bank statements, duplicate deposit slips, cancelled checks, cash receipts books, operating ledger and other cash records and documents, and the theatre box office for the purpose of inspection, check-up, making extracts therefrom and/or copies and/or an audit thereof.

Lessee shall, and Lessee hereby agrees to pay, without demand therefor, the rent as in this lease set forth and provided. Should Lessee become obligated to reimburse or otherwise pay Lessor one or more sums of money in addition to the fixed and percentage rents, the amount thereof may, at option of Lessor, be added to any subsequent installment of the fixed rent due and payable under this lease, and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of the fixed rent.

Article III.

Use of Premises

Lessee further covenants and agrees as follows:

(a) To use the demised premises throughout the

Plaintiffs' Exhibit No. 1—(Continued)

entire demised term for the presentation of entertainment consisting of either a "straight picture policy" or a "stage show policy," as such terms are hereinabove defined, and for the operation of such concessions or sale of such articles or facilities as are expressly referred to in Article II hereof, conducting and operating the same in a proper, lawful and reputable manner, and for no other business or purpose whatsoever; it being understood that Lessee may at any time change the operation of the theatre hereby demised from either a "straight picture policy" or a "stage show policy" to the other;

(b) If the theatre shall be operated on a "stage show policy," to present only the best de luxe "Fanchon and Marco" stage shows and presentations or other de luxe stage shows and presentations of the highest class; it being understood, however, that no "Fanchon and Marco" stage show or presentation, whether new, old or otherwise, shall be presented in any theatre in the City of Los Angeles, except in the demised premises, during the term of this lease;

(c) To exhibit in the demised premises during the demised term the motion pictures licensed for exhibition therein pursuant to the franchise agreement dated as of September 1, 1939, by and between Lessor and Lessee, and if Lessee shall exhibit any other motion pictures in addition to the motion pictures licensed pursuant to said agreement such ad-

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Plaintiffs' Exhibit No. 1—(Continued)

ditional motion pictures shall be only the best selection, made by it in good faith, of the highest quality, first-run feature motion pictures now or hereafter available to it (either directly or indirectly, through Fanchon & Marco, Inc., its and/or their subsidiaries, affiliates, associates, agents or legal representatives, or through any party in interest to any operating or management agreement affecting the theatre in the demised premises, or otherwise) for exhibition in the City of Los Angeles;

(d) To continuously conduct and operate the theatre throughout the entire demised term, except to the extent, if any, that it may be prevented from so doing by epidemic, act of God, strikes, repairs or alterations necessary to be made in the proper operation of the theatre (including those specifically provided for in Section 2. of Article VI hereof), and/or any one or more Governmental orders directing the closing of the theatre for a cause or causes not within Lessee's control;

(e) That it will not conduct its business in or upon the demised premises, or any department thereof, in competition with any business conducted on the date of this lease by either (1) any tenant of any part of the other commercial space of the building in which the demised premises are located, or (2) any tenant of any commercial space in any contiguous building or on any contiguous property.

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Plaintiffs' Exhibit No. 1—(Continued)

Article IV.

Water, Electric Light, Etc.

Lessee shall, and Lessee hereby agrees to pay as and when the same shall become due and payable, the theatre license fee, any and all license and/or inspection fees and other charges in connection with the use and operation of any electric sign and the canopy in front of the demised premises, as well as all license and inspection fees imposed by any Governmental authority whatsoever, and in addition thereto, all charges for fuel, heat, water, gas, electric current, for both light and power, used in, on, about or in connection with the demised premises.

Notwithstanding any other provision contained in this lease, it is expressly understood and agreed that if any water shall be used in connection with any theatrical exhibition presented in the demised premises, such as, for example, water used in connection with any ice-skating rink or swimming pool or water tank used in connection with a theatrical exhibition or presentation, the entire amount of water used for such purpose shall be paid for separately by Lessee, such payments (which shall be in addition to any other payments for water provided for in this lease, including the payments provided for in Article XXX hereof) to be made to Lessor promptly upon Lessor's presentation to Lessee of a bill therefor accompanied by reasonably satisfactory evidence that such bill has been correctly computed.

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Plaintiffs' Exhibit No. 1—(Continued)

All electric current consumed in, on, upon or about the demised premises for either light or power shall, at the option of Lessor, be purchased by Lessee through Lessor, the hereinbefore reserved rent not covering or including same. In the event of the exercise of said option, Lessee shall, at the rates and prices therefor prevailing and fixed from time to time by public service companies furnishing such service, pay monthly for the current consumed, it being understood that Lessor shall install meters to register the supply thereof. It is expressly understood and agreed that such supply of current may be discontinued at any time should Lessee fail or omit to pay the amount of any bill therefor within five (5) days after rendition; that such service may, at Lessor's option, be wholly discontinued upon not less than thirty (30) days' previous notice in writing, in which event, Lessee shall have the right to contract or otherwise arrange with any other person, firm or corporation for the further supply of such current; that Lessee shall make no change in and/or addition to the electrical equipment and/or appliances without prior written consent of Lessor in each instance; that the amount of any unpaid bill for such current may, at option of Lessor, be added to any subsequent installment of the fixed rent due and payable under this lease and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of the fixed rent; that Lessor shall be under no obliga-

Plaintiffs' Exhibit No. 1—(Continued)

tion to furnish or supply bulbs or lamps for the lighting fixtures in the demised premises, or the signs or canopy thereof. Lessor hereby reserves the right, in the event of any accident, or in the event of the making of repairs, alterations and/or improvements in the judgment of Lessor desirable or necessary to be made, to stop the service of the steam, plumbing, power and lighting systems, or any one or more of same, until the cause of the accident has been eliminated and/or until the repairs, alterations or improvements shall have been completed. Lessee hereby agrees that Lessor shall have no responsibility or liability whatsoever for not furnishing steam, plumbing, power or lighting service when prevented from so doing by strike, lockout, breakdown, accident, order or regulations of or by any Federal, State or Municipal Governmental authority, failure of water supply, failure of fuel supply, inability by the exercise of reasonable diligence to obtain fuel, inability to obtain necessary parts for repairs, or any other cause beyond Lessor's reasonable control.

Lessee agrees to pay to Lessor, in addition to all other sums referred to herein, that proportion of the cost of maintenance and operation of the night-watch and fire alarm boxes in said Paramount Theatre Building that the number of such boxes situated in the theatre portion of said building from time to time bears to the total number of such boxes in said building. Such payment shall be made an-

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Plaintiffs' Exhibit No. 1—(Continued)

nually upon presentation to Lessee of a receipted bill for such maintenance cost for the current year.

Article V.

Repairs

Lessee shall, throughout the entire term of this lease, at Lessee's sole cost and expense: (a) keep the interior and exterior of the demised premises, the furnishings, fixtures, personal property, equipment, signs and canopy thereof, the theatre air conditioning plant and the mechanical equipment now servicing the theatre in good order, condition and repair, such repairs to include those that are structural as well as non-structural, and the making of necessary substitutions therein, and to be equal in class to the original work; (b) to neither make, nor permit or suffer the commission of any waste, nuisance or injury; (c) replace any and all damaged and/or broken plate, ornamental and other glass; (d) before making any except trivial repairs, notify Lessor of Lessee's intention thereof and obtain Lessor's written consent thereto, before commencing the work; (e) keep all sidewalks abutting upon or adjacent to the demised premises in good order, condition and repair, including the replacing of all broken sidewalk lights, if any such lights there be, and also free and clear of snow, ice, dirt, rubbish and waste material; and (f) at the expiration of the demised term or sooner termination of this lease, surrender the demised premises and the furnishings, fixtures, personal property and equipment thereof,

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Plaintiffs' Exhibit No. 1—(Continued)

in as good order, condition and repair, as reasonable use thereof will permit. Should the Lessee fail or omit to commence promptly and expeditiously complete the work of any repairs herein required by Lessee to be made, then and in such an event, Lessor shall have the right, without the obligation, to make same at the cost and expense of Lessee, and any sums paid by Lessor for any such repairs shall be repaid by Lessee to Lessor, upon the latter's demand therefor. Lessee hereby expressly waives all right to make any repairs at the expense of Lessor under the provisions of any statute, whether now in effect or hereafter enacted, authorizing a tenant to make repairs at the expense of the landlord. Lessor shall, throughout the term of this lease, at Lessor's sole cost and expense, keep the exterior walls and roof of the demised premises in good order and substantial repair unless the necessity therefor shall be due to the carelessness, negligence or improper conduct of Lessee, or Lessee's agents, officers, servants, employees, patrons or visitors. Lessee has examined the demised premises and acknowledges that same and every part thereof are in a good and tenantable condition and that no representations with respect thereto have been made by Lessor, or by Lessor's agents, prior to or at the time of the execution of this lease, and Lessee accepts said premises as satisfactory in their present condition. Lessor shall not be obligated to divide, make any change in, on or to, or install or do anything whatsoever in, to or upon the said

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Plaintiffs' Exhibit No. 1—(Continued)

premises, or any part thereof; nor clean or paint the same, or any part thereof.

Lessee shall be liable to Lessor for all damages or injuries that may be caused to the demised premises, or to the building of which same are a part, by Lessee, or by its agents, officers, servants, employees, customers, patrons, visitors and/or persons making deliveries to Lessee, or in moving any personal property of any whatsoever kind or character in or out of the demised premises. Lessor reserves and shall have the right to make and enforce all reasonable rules and regulations for the use and occupation of the demised premises and Lessee shall comply with all such rules and regulations; and in this regard, Lessee agrees faithfully to observe and strictly comply not only with all rules and regulations now existing, but also such other reasonable rules and regulations hereafter from time to time promulgated as Lessor may, in its judgment, deem necessary or proper for either (a) the safety, care and/or cleanliness of the demised premises and/or the building of which same are a part; (b) the comfort of the other tenants of the building; or (c) the preservation of good order therein. Lessee shall also cause its agents, officers, servants, employees, customers, patrons and visitors to faithfully observe and strictly comply with all such rules and regulations, all of which said rules and regulations are hereby incorporated herein and made a part of this lease.

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Article VI.

Alterations and Improvements

Section 1. Without the prior written consent of Lessor in each instance Lessee shall not install any one or more partitions, nor make any other alteration, addition or improvement in, to or upon the demised premises or the exterior thereof, or any part of either or both. In the event Lessor consents that Lessee may install partitions and/or make one or more other alterations, additions or improvements, the partitions shall be of a type approved by Lessor and they shall be installed and all other alterations, additions and improvements shall be made and done by mechanics and/or contractors approved by Lessor, and Lessee shall pay the entire cost thereof, including the cost of materials and replacements. Under no circumstances whatsoever shall any such consent be extended so as to cover or include anything not specified therein. All alterations, additions and improvements made in, to or upon the demised premises or the exterior thereof, and all partitions, railings, mezzanine floors, galleries and the like placed therein or thereon, shall immediately become, be and always remain the property of Lessor, and remain upon, and without disturbance, molestation or injury be surrendered with, the demised premises as a part thereof.

Section 2. Lessee agrees to make the improvements of the theatre portion of the building on the demised premises specified in Schedule I hereto annexed, consisting of the installation of new fur-

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Plaintiffs' Exhibit No. 1—(Continued)

niture, furnishings, fixtures and equipment and the making of repairs, alterations and redecorations, and to expend approximately the sum of Fifty Thousand Dollars ($50,000) in making such improvements, which shall be completed prior to December 31, 1939; it being expressly agreed that Lessee's failure to complete such improvements on or before said date shall constitute a material breach of, and default under, this lease on the part of Lessee. Lessee further agrees that if and when it shall be able to obtain the necessary permits therefor from the State or Municipal Governmental Authorities (or their respective Departments or Bureaus) having jurisdiction thereof without thereby increasing the cost thereof beyond the approximate amount hereinafter specified, Lessee shall promptly reconstruct and modernize the present marquee over the Sixth Street entrance to the demised premises, including the installation of new fixtures and the making of all necessary structural changes in connection therewith, at an approximate cost of Thirteen Thousand Dollars ($13,000), it being nevertheless agreed that Lessee shall be obligated to do such work forthwith if Lessor, in its sole discretion, shall elect to bear the cost thereof in excess of the approximate cost hereinabove specified. Before proceeding with any such improvements, Lessee shall first submit to Lessor all contracts proposed to be made in connection therewith and detailed plans and specifications for any such improvements involving structural changes, and shall obtain the written ap-

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Plaintiffs' Exhibit No. 1—(Continued)

proval thereof of Lessor, and prior to the commencement of any such improvements, Lessee shall indemnify Lessor by satisfactory indemnity which shall fully save and hold Lessor harmless from any and all costs, charges, expenses and liabilities by reason of any such improvements, or in any way arising out of or in connection therewith. Lessee agrees that all materials to be used and any article or articles which are at any time to be installed in the demised premises in connection with such improvements, shall be fully paid for (or adequate provision made for the payment thereof) by Lessee at the time of the installation of any thereof, and all of the same shall be free from any conditional bills of sale, agreements of lease or other liens, mortgages or encumbrances whatsoever, and Lessee further agrees that in making such improvements it will satisfy and discharge every lawful claim or demand which if unpaid might constitute a lien or charge upon the demised premises or any part thereof in the nature of liens of mechanics, contractors, laborers or material men, and that upon the completion of said work the demised premises shall be free and clear of any and all such liens or charges resulting from the performance of such work, and that all such improvements shall immediately upon the installation thereof become, be and always remain the property of Lessor, and shall remain upon, and without disturbance, molestation or injury be surrendered with, the demised premises as a part thereof. Lessee agrees to protect, indemnify

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Plaintiffs' Exhibit No. 1—(Continued)

and save and keep harmless Lessor of and from any and all loss, cost, damages and expenses whatsoever arising out of or connected with said improvements, including liability to workmen and to other persons on said premises and to persons who may be using the streets and sidewalks adjacent to said premises, and all other liabilities, liens or charges connected with or growing out of the work aforesaid.

It is agreed that Lessee shall have the right to close the theatre in the demised premises while the improvements specified in Schedule I hereto annexed are in the course of being made, and that, notwithstanding any other provisions in this lease contained, Lessee shall not be obligated to pay any rent hereunder for and during the first week of such closing, but shall nevertheless be obligated to pay the fixed weekly rent for and during the remaining period of such closing after such first week.

Lessor agrees that the amounts realized by Lessee from the salvaging or scrapping of any article of furniture, furnishings, fixtures or equipment removed and replaced in connection with said improvements may be applied by Lessee to the cost of said improvements, provided, however, that the same shall be sold or otherwise disposed of only on terms approved by Lessor, it being agreed that no such articles shall be removed or replaced without Lessee's having first obtained Lessor's written consent thereto and that Lessor shall execute any bills of sale or other documents (in form approved by Lessor's counsel) required in connection with such sale

Plaintiffs' Exhibit No. 1—(Continued)

or other disposition of such articles. Within ten (10) days after the completion, in a first-class manner (it being expressly agreed that all upholstery, repainting and redecoration in connection therewith shall be performed to the reasonable satisfaction of Lessor, and that samples of all materials used shall first have been submitted to and approved by Lessor), of all the improvements specified in Schedule I hereto annexed, and within ten (10) days after the completion, in a first-class manner and substantially in accordance with the plans and specifications therefor as approved by Lessor, of the additional improvements to be made thereafter by Lessee as provided in this Section 2, Lessee shall submit to Lessor a statement and report showing in detail all items of cost and expense incurred in connection with such completed improvements and all sums realized by Lessee from the aforementioned salvaging or scrapping of obsolete articles removed from the demised premises in connection therewith, and together with each such statement and report Lessee shall furnish Lessor with receipted bills, vouchers, cancelled checks and such other papers as Lessor may reasonably request to substantiate the items detailed therein and payment (or the provision made for the payment) of the same in full by Lessee. Within thirty (30) days after each such statement and report has been submitted to Lessor, Lessor and Lessee shall execute an appropriate memorandum certifying the exact

Plaintiffs' Exhibit No. 1—(Continued)

total amount of the net cost incurred by Lessee (which shall not include any interest or finance charges whatsoever) in connection with such completed improvements, allocating such net cost to the various items comprising said improvements, and specifying the respective rate at which such cost of each such item shall be amortized. For the purposes of this lease, the certified net cost of said improvements shall be amortized in accordance with standard accounting practices governing the depreciation of the particular items comprising said improvements, but in no event shall the certified net cost of any particular item be amortized over a period longer than the unexpired portion of the period originally limited for the duration of the term of this lease remaining after the date of the actual installation or completion of such item. Lessor hereby agrees that in the event it shall hereafter exercise its right to terminate this lease prior to the date originally limited for the duration of the term hereof in accordance with the provisions of clause (e) of Section 1 of Article XXIX hereof if such right shall be exercised solely by reason of a cancellation and termination of the franchise agreement dated as of September 1, 1939, therein referred to for some reason or cause other than an act of omission by or default or breach thereunder on the part of Lessee, or in accordance with the respective provisions set forth in Sections 3 or 4 of Article XXIX hereof, or in the event that Lessee

Plaintiffs' Exhibit No. 1—(Continued)

shall exercise its right to terminate this lease in accordance with the provisions of Section 2 of Article XXIX hereof, Lessor shall pay over to Lessee upon the date of such termination a sum equal to the then unamortized total amount of the net cost incurred by Lessee in connection with all of said improvements as certified as aforesaid.

Article VII.

Trade Name

It is expressly understood and agreed that the demised premises shall continue to be known under the name "Paramount Theatre" during the entire demised term, unless Lessor and Lessee shall mutually agree upon another name; provided always, however, that should the use of the name "Paramount" be enjoined by an order of a court of competent jurisdiction, Lessor shall select another name and Lessee shall thereafter use such name throughout the then remainder of the demised term. It is further understood and agreed that the name "Paramount Theatre" and/or any other name substituted therefor, under the provisions of the prior sentence hereof, shall, at all times, be and remain the exclusive property of Lessor, and that Lessee shall have no right to use same, except to designate the demised premises during the term hereof, and upon the expiration of the demised term, or sooner termination of this lease, the right to such use shall revert to and revest in Lessor.

Plaintiffs' Exhibit No. 1—(Continued)

Article VIII.

Right of Inspection by Lessor

It is agreed that Lessor and its agents, officers, servants and employees shall have the right, without being obligated so to do, to enter upon the demised premises at all reasonable hours during the demised term for purposes of examining, inspecting and/or making necessary alterations and repairs, all of which shall be done without disturbing Lessee's business any more than necessary.

Article IX.

Indemnity of Lessor

Lessor shall not be liable for, and Lessee covenants and agrees to protect, indemnify and save and keep harmless Lessor and the owner of the fee and/or any mortgagee or trustee under any deed of trust constituting a lien on the demised premises, of and from any and all loss, cost, damages and expenses whatsoever arising out of or connected with any accident or other occurrence on either the demised premises or the sidewalk or sidewalks in front thereof, which shall have caused personal injuries, including death at any time resulting therefrom, and/or damage to property, due or claimed to be due to any act or neglect on the part of Lessee, its agents, officers, servants, employees, patrons or invitees, or due or claimed to be due to failure or omission on the part of Lessee, its agents, officers, servants, employees, patrons or in-

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vitees, to comply with and keep and perform the requirements and provisions of this lease on Lessee's part to be kept, observed, performed and abided by, or due or claimed to be due to Lessee's use of the demised premises.

Article X.

Insurance

Lessee covenants and agrees, at its sole cost and expense, (a) to maintain and keep in full force and effect throughout the entire demised term, fire insurance covering the furnishings, fixtures, personal property and equipment of the demised premises in an amount equal to at least ninety (90) per cent. of the full insurable value thereof, and other adequate insurance against any loss or damage sustained and/or injury to or the death of any one or more persons, including, but not by way of limitation, the insurance required to be carried under the "Workmen's Compensation Insurance and Safety Act of the State of California," and any and all acts amendatory thereof and supplemental thereto, with respect to the employees upon the demised premises, all of which insurance shall be placed with a Board insurance company or companies qualified to do business in the State of California; (b) that the limits of the public liability insurance shall be those specified from time to time by Lessor, but in no event less than Fifty Thousand Dollars ($50,000) and One Million Dollars ($1,000,000); (c) that the named insured under the fire and public liability

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Plaintiffs' Exhibit No. 1—(Continued)

insurance policies shall be Lessor, Lessee, The Anglo California National Bank of San Francisco, as Trustee under a certain Deed of Trust and Mortgage of Chattels dated as of March 1, 1937, as amended and supplemented by a certain Supplemental Trust Indenture and Mortgage of Chattels dated as of March 1, 1939, and/or any other mortgagee or trustee under any mortgage hereafter created constituting a lien on the demised premises and/or building of which same are a part; (d) that if Lessor so requests, to have the public liability insurance covered as a part of any blanket policy carried by Lessor and/or any of its subsidiary or affiliated companies, and to make payment of the premium for such coverage to Lessor upon Lessor's demand therefor; (e) that in the event of the failure on the part of Lessee to procure and maintain any insurance required to be procured and maintained by it pursuant to the provisions hereof, Lessor may, upon notice to Lessee, procure the same, and Lessee agrees to make payment of the premium for any policies of such insurance so taken out or procured by Lessor; and (f) that Lessee shall from time to time deliver to Lessor the policies for such insurance or proper evidence by certificate from the insurance companies covering and carrying said insurance that the insurance required under this lease is being maintained.

Lessee shall neither make, nor permit or suffer to be made, any use of the demised premises and/or

Plaintiffs' Exhibit No. 1—(Continued)

the furnishings, fixtures, personal property or equipment thereof, which will cause an increase in the premium rate of any insurance policy thereon, or in the premium rate of any insurance policy covering the building of which the demised premises are a part and/or the contents thereof; nor shall said premises be used or permitted to be used for any purpose whatsoever other than as in Article III hereof provided. Lessee shall neither make use of, nor permit or suffer any one or more third parties to make use of, the streets or sidewalks abutting the demised premises either for storage, hack, automobile, peanut, lunch-wagon, flower or other stand, or other business, or for any unlawful purpose or purposes; nor for any purpose or purposes that will injure or tend to injure the reputation of the demised premises, or the building of which same are a part. Lessee shall not permit the demised premises to be vacant or unoccupied; nor burn or use or keep thereon, or permit to be burned or used or kept thereon, any gasoline, kerosene, distillate, petroleum, explosive or inflammable substance; nor install or operate any machinery or apparatus which shall tend to injure the building of which the demised premises are a part, or which will annoy other tenants thereof; and in any event, no machinery or apparatus shall be installed or operated on the demised premises without the written consent of Lessor first had and obtained. Any increase of insurance premium on the building of which the de-

Plaintiffs' Exhibit No. 1—(Continued)

mised premises are a part and/or the contents thereof caused by any act or omission on the part of Lessee, its agents, officers, servants or employees, shall be paid by Lessee to Lessor upon demand. Lessee shall, at Lessee's sole cost and expense, install in the demised premises one or more fire extinguishers of such capacity and make as shall meet with the approval of Lessor, and shall periodically cause same to be refilled or recharged; and if Lessee shall fail or omit to install and/or refill and/or recharge such fire extinguishers, Lessor shall have the right to do so at the expense and for the account of Lessee. Lessee shall promptly report to Lessor any damage or injury to the demised premises. Neither Lessee, nor its agents, officers, servants or employees, shall solicit business from the sidewalks, or vestibule or door of the demised premises. Lessee shall neither keep, maintain or place, nor permit or suffer to be kept, maintained or placed, on any sidewalk upon which the demised premises abuts, or in any vestibule or door-way of the demised premises, any show-cases, troughs or counters for any purpose whatsoever, without Lessor's written consent thereto first had and obtained. Lessee shall not sign any petition for, or otherwise consent to the granting of any curb, sidewalk or street concessions or privileges for buses, taxicabs, or to any peddler, news vendor, or any other persons desiring to ply a trade or have a stand or station, or otherwise do business in or about the front of the demised premises.

Plaintiffs' Exhibit No. 1—(Continued)

Article VI.

Signs

Lessee shall have the right, in so far as such right may be given and granted by Lessor, to maintain and operate, at its sole cost and expense, throughout the entire demised term, the present signs, canopy and attraction boards of the latter, and any renewals or replacements thereof; it being expressly agreed that no other sign illuminated or non-illuminated, or canopy or attraction board shall be erected without Lessor's written consent first had and obtained.

Article XII.

Fire Clause

Should the demised premises be damaged by fire, earthquake or other catastrophe, Lessee shall give immediate notice thereof to Lessor, and unless this lease be terminated as in this Article hereinafter provided, the damage thereto shall be repaired as speedily as possible after receipt of such notice, by and at the cost and expense of Lessor. If public performances may not be held in the demised premises as a result of such damage and the damage be not due to any fault or neglect on the part of Lessee, its agents, officers, servants, employees, patrons or visitors, from and after receipt by Lessor of Lessee's notice of the damage, rent shall cease until the repairs have been completed to such an extent as to permit resumption of public perform-

Plaintiffs' Exhibit No. 1—(Continued)

ances. If as a result of fire, earthquake or other catastrophe the building of which the demised premises are a part be destroyed or so damaged (whether the demised premises be damaged or not), that Lessor shall decide either to rebuild or not to rebuild, or to repair and/or restore or not to repair and/or restore, notwithstanding any present or future law or statute to the contrary, Lessor shall have the right to cancel and terminate this lease and end the term thereby demised within sixty (60) days from the date of the destruction or damage, by sending to Lessee, at the address hereinafter specified, written notice to that effect by registered United States mail, not less than five (5) days prior to the termination date fixed in and by said notice; and upon the mailing of such notice, this lease shall expire and be cancelled and terminated and the term thereby demised come to an end by lapse of time on the termination date in said notice specified as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee shall, and Lessee hereby agrees to, vacate and surrender the demised premises on said termination date. Should any question arise between Lessor and Lessee as to whether or not the repairs in this Article referred to have been made with reasonable dispatch, due allowance shall be made for delays connected with the adjustment of the loss under the insurance policies and delays caused by or due to what are commonly known as "labor troubles." Should this lease be

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cancelled and terminated pursuant to any provision thereof, and Lessee vacate and surrender the demised premises in compliance with the notice thereof sent by Lessor, Lessor shall return to Lessee, if Lessee be not in default under this lease, a pro rata of any installment of rent paid by Lessee for a period of time extending beyond the date of the vacation and surrender.

Article XIII.

Condemnation

Should the demised premises or the building of which said premises are a part, or the land upon which said building is erected and/or any vacant part or portion of said land, or any one or more of same, or any part or portion of any one or more of same, be taken by virtue of the power of eminent domain or for any public or quasi-public improvement or purpose, Lessor, at its option, may cancel and terminate this lease and end the term thereby demised by sending to Lessee, at the address hereinafter specified, written notice to that effect by registered United States mail, not less than five (5) days prior to the termination date fixed in and by said notice, and upon the mailing of such notice this lease shall be cancelled and terminated and the term thereby demised come to an end by lapse of time on said termination date as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee shall, and Lessee hereby agrees to

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vacate and surrender the demised premises within five (5) days after the mailing of such notice. If in any condemnation or similar proceeding, whether or not same results in a partial or total taking of the demised premises, an award accrue or be payable as a result of the taking, the entire award shall, as between Lessor and Lessee, be and become the sole and absolute property of Lessor and Lessee shall not be entitled to any part or portion thereof. Should this lease be cancelled and terminated pursuant to the foregoing provisions of this Article and Lessee vacate and surrender the demised premises in compliance with and pursuant to the hereinbefore referred to notice, Lessor shall return to Lessee, if Lessee be not in default under this lease, a pro rata of any installment of rent paid by Lessee for a period of time extending beyond the date of the vacation and surrender.

Aricle XIV.

Taxes

Lessee shall, and Lessee agrees to pay, throughout the entire demised term, all taxes and assessments of every kind or description that may be levied upon or assessed against any furnishings, fixtures, personal property and equipment in the demised premises owned by Lessee.

The furnishings, fixtures, personal property and equipment in the demised premises belonging to Lessor on the date hereof are listed in an inventory covering same, a copy of which is attached hereto,

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Plaintiffs' Exhibit No. 1—(Continued)

marked Exhibit A, and by this reference thereto incorporated herein and made a part of this lease.

Article XV.

Subordination

This lease is now, and shall always be subject and subordinate to: (a) the Deed of Trust and Mortgage of Chattels dated as of March 1, 1937, made by Paramount Properties, Incorporated, to The Anglo California National Bank of San Francisco, as Trustee, as amended, modified and supplemented by that certain Supplemental Trust Indenture and Mortgage of Chattels dated as of March 1, 1939, by and among Paramount Pictures Inc., The Anglo California National Bank of San Francisco, as Trustee, and The First National Bank of Chicago, including any and all renewals or extensions thereof; (b) any one or more other mortgages, deeds of trust or instruments in the nature of a mortgage heretofore or hereafter given to refund or refinance the mortgage and deed of trust referred to in (a) hereof; and (c) any and all other mortgages now or hereafter a lien or liens on the demised premises and/or the building of which same are a part, and any and all advances heretofore or hereafter made under the security thereof.

Lessee covenants and agrees to execute, acknowledge and deliver upon request, all documents demanded by Lessor which the latter may deem neces-

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sary or desirable to further effect the subordination of this lease to any of the above-referred-to mortgages and/or deeds of trust and/or instruments in the nature of a mortgage, and upon Lessee's failure or omission to execute, acknowledge and deliver same within five (5) days after Lessor's written request therefor, Lessor may execute and deliver the necessary instruments of subordination in the name of Lessee and on its behalf and as its agent and attorney-in-fact; and Lessee hereby irrevocably constitutes and appoints Lessor its agent and attorney-in-fact for said purpose, and it hereby ratifies and confirms any and all acts done by Lessor in pursuance hereof.

Article XVI.

Liens for Labor or Materials

Lessee shall keep the demised premises and the building of which same are a part, free and clear of any and all liens arising out of or connected with the making by Lessee of any repairs, improvements, additions or alterations in, to, upon or about the demised premises; and should any such lien become a charge against said premises, Lessee shall promptly pay and satisfy and discharge the same. If Lessee fails or omits so to do, then and in such an event, Lessor may pay same and any amount so paid by Lessor shall be repaid by Lessee on Lessor's demand therefor, or Lessor may, at its option, add same to any subsequent installment of

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Plaintiffs' Exhibit No. 1—(Continued)

the fixed rent payable under this lease and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of such fixed rent.

Article XVII.

Waiver of Breach and Cumulative Rights

It is further covenanted and agreed by and between the parties hereto: (a) that none of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of this lease to be kept or performed by Lessee shall in any manner be waived, amended, altered, modified or abandoned, except by a written instrument duly signed and delivered by Lessor, and not otherwise, and that no act or acts, omission or omissions, or delays, or series of acts or omissions, or waiver, acquiescence of forgiveness by Lessor as to any failure of performance, either in whole or in part, by Lessee of any of the terms, covenants, conditions, agreements, obligations, provisions or undertakings of this lease shall be deemed or construed to be a waiver by Lessor of the right at all times in the future to insist upon the full and complete performance by Lessee of each and all of the said terms, covenants, conditions, agreements, obligations, provisions and undertakings thereafter to be kept or performed hereunder; nor shall an acceptance of surrender of this lease be effected without a written consent thereto by Lessor; and (b) that,

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Plaintiffs' Exhibit No. 1—(Continued)

subject to the provisions of Article XXVIII hereof, all rights and remedies of Lessor and Lessee under this lease shall be cumulative and that none shall exclude any other legal or equitable rights and remedies.

Article XVIII.

Holding Over

Any holding over after this lease shall have expired, whether by lapse of time or otherwise, with the consent expressed or implied of Lessor, shall be a tenancy from week to week at a weekly rental, payable in advance, equal to the weekly installment of the fixed rent, as increased by a pro rata of the highest audit period percentage rent, theretofore paid or theretofore payable hereunder. Such week to week tenancy shall be subject to termination at the end of any week on three (3) days' written notice to Lessee, and shall otherwise be on all the terms, covenants, conditions, agreements, obligations, provisions and undertakings in this lease set forth and contained so far as applicable.

Article XIX.

Law and Insurance Observance

Lessee shall neither bring to, have, keep, sell or give away, nor knowingly permit or suffer any other person or persons to bring to, have, keep, sell or give away, in, upon or about the demised premises, or any part thereof, any intoxicating beverage whatsoever; and Lessee shall neither do,

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Plaintiffs' Exhibit No. 1—(Continued)

nor permit or suffer to be done, in, upon or about the demised premises, or any part thereof, any act which shall or might subject Lessor to any liability or responsibility whatsoever under or by reason of the provisions of any statute, ordinance or other law.

Lessee shall comply with all notes, notices, rules, orders, recommendations, regulations and requirements involving the making of structural and/or non-structural alterations, repairs, improvements and changes, of all Federal, State and Municipal Governmental authorities and their several respective Departments and Bureaus, in, to or upon the demised premises and/or the furnishings, fixtures, personal property and equipment therein and/or the occupancy and use thereof. Lessee shall also comply with all Federal and State statutes and Municipal ordinances relative to said premises and/or said furnishings, fixtures, personal property and equipment and/or said occupancy and use. Lessee shall also comply with all rules, orders, regulations and requirements of the California Board of Fire Underwriters, the Los Angeles Fire Insurance Exchange, or local Inspection and Rating Bureaus, and similar bodies, involving structural and/or non-structural matters and things.

Article XX.

Assignment and Subletting

Lessee shall not, without the written consent of Lessor, either assign, mortgage, pledge or hypothe-

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Plaintiffs' Exhibit No. 1—(Continued)

cate this lease, in whole or in part, or any interest therein, or sublet the demised premises, or any part thereof, and no such consent given shall be construed to cover any subsequent assignment or subletting. No assignment or subletting shall be valid unless an executed duplicate copy of the written instrument covering same shall have been delivered to Lessor; nor shall any assignment or sublease release or discharge Lessee from any of its liability under this lease, including, but not by way of limitation, Lessee's liability to pay the hereinbefore reserved rent for the then remainder of the demised term. By the acceptance of any assignment, however, the assignee shall, from and after the date thereof, be obligated and bound to keep and perform all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, including, but not by way of limitation, the covenant to pay the rent therein reserved and accruing from the date of such assignment.

Article XXI.

Abatement

If, during the demised term, under any present or future laws or any other Governmental authority, any order of abatement or any order or judgment preventing the use of the demised premises by Lessee shall be made upon the ground that said premises either in whole or in part, constitutes a nuisance, or are or have been used in violation of law by Lessee, or by Lessee's officers, servants,

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Plaintiffs' Exhibit No. 1—(Continued)

employees, patrons, or invitees, then and in such an event, Lessee shall not be released thereby from any of Lessee's liabilities or obligations under this lease, including, but not by way of limitation, Lessee's liability and/or obligation to pay the hereinbefore reserved fixed rent.

Article XXII.

Provision for Notice

Each and every notice required to be given by Lessor under the terms and provisions of this lease shall be in writing and be enclosed in a sealed post-paid envelope and be sent by registered United States mail addressed to Lessor, Seventh Floor, 1501 Broadway, New York City, New York, with the envelope further marked "for the attention of the Legal Department," and a copy thereof sent in a sealed post-paid envelope by registered United States mail addressed to Lessor, at 323 West Sixth Street, Los Angeles, California. Each and every notice required to be given to Lessee under the terms and provisions of this lease shall be in writing and be enclosed in a sealed post-paid envelope and be sent by registered United States mail addressed to Lessee at Paramount Theatre Building, 325-329 West Sixth Street, Los Angeles, California.

If either party should change its address and serve written notice of the change upon the other, using a writing sent by registered United States mail as the means of communication, all subse-

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quent notices above referred to shall be sent to the new address.

Article XXIII.

Quiet Enjoyment

Lessor hereby covenants, that subject to the provisions of Article XV hereof, Lessee, on paying the rent herein reserved, and keeping, observing, performing and abiding by each and every of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease on the part of Lessee to be kept, observed, performed and abided by, shall and may peaceably and quietly have, hold and enjoy the demised premises, free from molestation, eviction or disturbance by Lessor, or by any other person or persons claiming through or under Lessor, provided and in no event shall this covenant be binding on Lessor after the date of any conveyance by it of its title to the demised premises. If Lessor assigns this lease, however, this covenant of quiet enjoyment shall be binding upon its assignee.

Article XXIV.

Cancellation of Current Sublease

In consideration of the execution and delivery of this lease by Lessor and Lessee, and the sum of One Dollar ($1.00) by each to the other in hand paid on the delivery hereof, receipt of which is hereby acknowledged, the Indenture of Sublease of the hereinbefore demised premises, made by and

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Plaintiffs' Exhibit No. 1—(Continued)

between Paramount Properties, Incorporated (the predecessor in interest of Lessor), and Lessee as of the 17th day of October, 1935, as said Indenture of Sublease has been heretofore amended and/or supplemented, shall be, and the same hereby is, cancelled and terminated, and the demised term thereof brought to an end, as of the close of business on the 31st day of December, 1938; it being expressly understood and agreed that such cancellation and termination shall be without prejudice to any rights or liabilities arising under the terms and provisions of said Indenture of Sublease as heretofore amended and/or supplemented for and during the period up to the effective date of such cancellation and termination, including specifically, but without in any way limiting the generality of the foregoing, any and all rights and obligations with respect to the payment of the rents, fixed, percentage or otherwise, and the payment of damages and any other sum or sums due under such terms and provisions for the period up to and including December 31, 1938, all of which rights and obligations are hereby expressly reserved and excluded from such cancellation and termination.

Article XXV.

Damage to Property

It is further understood, and Lessee hereby agrees: (a) that Lessor shall not be responsible or liable for (1) any injury to any person, including death resulting at any time therefrom; or (2) any

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damage or injury to the demised premises or to any property whatsoever thereon, due to or caused by steam, gas, electricity, water, rain, snow or ice which may escape or leak and/or flow from, into or within any part of the building of which the demised premises are a part, or from the pipes, wires, appliances or plumbing works thereof, or from any other building, place or quarter; or (3) any damage or injury due to the act or neglect of any other tenant or occupant of said building, or due to any latent defect in said building, or due to the act or neglect of any owner or occupant of adjacent or contiguous property; or (4) any damage to property, or personal or other injury, from any cause whatsoever, whether or not same results from one or more acts of omission or commission by or on the part of any one or more of Lessor's agents, officers, servants, employees or contractors; or (5) any interference with the light or any other incorporeal hereditament resulting from or caused by acts of third parties, or resulting from or caused by any public or quasi-public work by or for any Governmental authority whatsoever; or (6) any inconvenience, discomfort or interruption of business resulting from or due to the making of repairs, improvements or alterations in, to or upon the building of which the demised premises are a part, or any part thereof, and/or any of the fixtures therein and/or any of the appurtenances or equipment thereof; or (7) any circumstance or condition not within Lessor's control; and (b) that no curtail-

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ment of space in the demised premises due to or arising out of a compliance with the provisions of Article XIX hereof, shall ever be deemed actual or constructive eviction, and that no claim shall be made or allowed therefor either by way of damages, diminution or abatement of rent, or otherwise.

Article XXVI.

Lessee's Bankruptcy, Etc.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of this lease that if Lessee be adjudicated a bankrupt, or if a petition for reorganization of Lessee be filed by or against it under the provisions of the National Bankruptcy Act or any amendment thereof and approved by the court in which the same be filed, the happening of such event shall be deemed to constitute a breach of this lease, and upon such adjudication of bankruptcy or approval of such petition, this lease shall ipso facto and without entry or other action by Lessor become and be terminated; and notwithstanding any other provisions of this lease, Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said

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term at the time of such termination, the claim for which said agreed damages shall be an immediate provable claim in such bankruptcy or reorganization proceeding; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time after the adjudication in the bankruptcy or reorganization proceeding within which its claim must be filed to permit of the adoption of said rental value by it in said claim, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question.

Article XXVII.

Lease Guarantor's Bankruptcy, Etc.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of the execution and delivery of this lease by Lessor that if Fanchon & Marco, Inc., a corporation organized and existing under the laws of the State of California, (the guarantor of Lessee's performance of all the terms, covenants, conditions, agreements, obligations, provisions and undertakings, including, but not by

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way of limitation, the payment of the rents, fixed, percentage or otherwise, the payment of the damages specified in Article XXVI, this Article XXVII and Article XXVIII hereof, and the payment of any other sum or sums when due to Lessor under this lease, in this lease set forth and contained on the part of Lessee to be kept, observed, performed and abided by) be adjudicated a bankrupt, or makes a general assignment for the benefit of creditors, or if a petition for reorganization of said Fanchon & Marco, Inc., be filed by or against it under the provisions of the National Bankruptcy Act or any amendment thereof and approved by the court in which the same be filed, the happening of any such event shall be deemed to constitute a breach of this lease by Lessee, and upon such adjudication in bankruptcy, or approval of such petition, or the making of such assignment, as the case may be, this lease shall ipso facto and without entry or other action by Lessor become and be terminated; and notwithstanding any other provisions of this lease, Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for which would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination, the claim for which said agreed damages shall also be an immedi-

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ate provable claim in such bankruptcy or reorganization proceeding, or with the assignee for the benefit of creditors, as the case may be, under the guaranty of said Fanchon & Marco, Inc., hereto annexed; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time after the institution of such proceeding or the making of such assignment, as the case may be, within which its claim must be filed to permit of the adoption of said rental value by it in said claim, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question.

For the more effectual securing to Lessor of the rent and other payments herein provided, it is agreed as a further consideration of this lease that if receivership proceedings (other than the appointment of a receiver in a bankruptcy or reorganization proceeding under the provisions of the National Bankruptcy Act or any amendment thereof), shall be instituted against said Fanchon & Marco, Inc., which shall not have been discharged within sixty (60) days after being instituted, such receivership proceedings shall be deemed to consti-

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tute a breach of this lease by Lessee, and upon the expiration of said thirty (30) days, it shall be lawful, at Lessor's option, without further notice to Lessee, for Lessor to reenter the demised premises, remove all persons therefrom, repossess itself of said demised property, realty and personalty, and either

(a) terminate this lease, in which event Lessee agrees immediately to pay to Lessor as agreed damages for Lessor's damage arising out of such breach of this lease, a sum of money equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination, the claim for which said agreed damages shall also be an immediate provable claim in such receivership under said guaranty by Fanchon & Marco, Inc., hereto annexed; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within the period of time within which its claim must or may be permitted to be filed to permit of the adoption of

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said rental value by it in said claim, and the then present cash value of future rent and future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event, the rents received on such relettings shall be applied first to the expenses, if any, incurred by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the

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amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

Article XXVIII.

Default Provisions

All the terms, covenants, conditions, agreements obligations, provisions and undertakings on the part of Lessee to be kept, observed, performed and abided by hereunder are conditions precedent to be kept, observed, performed and abided by by Lessee to entitle Lessee to continue in possession of the demised premises under this lease, and if Lessee shall make default either in the payment of the hereinbefore reserved rent, fixed, percentage or otherwise, or of any other sum hereunder when due to Lessor, as herein provided, or any part or portion of any one or more of them, and such default shall continue for a period of ten (10) days after written notice thereof from Lessor, or in the observance or performance of any other of said terms, covenants, conditions, agreements, obligations, provisions and undertakings, and such default be not cured or remedied within fifteen (15) days after written notice thereof from Lessor, or if Lessee be adjudged an insolvent debtor under the insolvency debtor laws of any state, or if any execution or attachment be issued against Lessee

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or against any of Lessee's property or effects and if as a result thereof there shall be an actual or attempted taking or occupation of the demised premises by someone other than Lessee, or if Lessee shall make a general assignment for the benefit of Lessee's creditors or be placed in liquidation, or if receivership proceedings shall be instituted against Lessee and not discharged within sixty (60) days after being instituted, or if in any such receivership proceeding a receiver, liquidator, keeper or other officer or agent shall be appointed and not discharged within three (3) days after appointment, or if this lease, or any interest or estate created thereby shall vest in any other person or persons by operation of law or otherwise, except by the written consent of Lessor and except by the death of an individual lessee, or if Lessee shall fail to take possession of the demised premises hereunder or shall abandon or vacate said premises (unless Lessor shall, by notice in writing, accept surrender thereof and thereunder expressly release Lessee from all obligations thereunder), then and in any of said events, it shall be lawful, at Lessor's option, without further notice to Lessee, for Lessor to reenter the demised premises, either with or without process of law, remove all persons therefrom, repossess itself of said demised property, realty and personalty (it being understood that no reentry hereunder by Lessor shall be construed as an election to terminate this lease un-

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less written notice to that effect shall be given by Lessor to Lessee), and either

(a) Terminate this lease, in which event Lessee agrees immediately to pay to Lessor as agreed damages for Lessor's damage arising out of such breach of this lease, a sum of money equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within six (6) months after such termination, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event,

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the rents received on such relettings shall be applied, first, to the expenses, if any, incurred by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting, and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

If Lessor shall commence any summary action or proceeding under any unlawful detainer act or similar statute for the forfeiture of this lease and/or for the possession of the premises thereby

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demised, then Lessor shall have the right, upon two (2) days' notice, to have a receiver appointed by the court to take possession of said premises and collect any rent that may be or become due from any subtenant and to hold the same during the pendency of said action, subject to final disposition by the court; and if such a receiver be appointed at the instance of Lessor, such receiver may, if it be necessary or convenient in order to collect such rents and the profits derived from any business carried on upon said premises, conduct the business of Lessee then being carried on upon said premises and take possession of any personal property belonging to Lessee and used in the conduct of such business, and use the same in conducting such business upon said premises without compensation to Lessee. Lessee hereby appoints Lessor as Lessee's attorney-in-fact, with irrevocable power during the pendency of any such summary action or proceeding and until the appointment of such a receiver, to collect from any and all subtenants the rents due or to become due from any such subtenant during the pendency of any such proceeding. Lessee hereby waives any and all rights of redemption of said premises that is now or may hereafter be given by any such statute or otherwise, and also waives any and all notices to dispossess Lessee preliminary to the institution of any such summary proceeding.

In the event this lease be terminated under any such summary action or proceeding, notwithstand-

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ing any other provisions of this lease. Lessee hereby agrees and Lessor shall forthwith upon such termination be entitled to recover damages for such breach either

(a) In an amount equal to the difference between the then cash value of the hereinbefore reserved fixed rent for what would have constituted the remainder of the demised term were it not for such termination, and the then cash rental value of the demised premises for said remainder of said term at the time of such termination; and in making said computation the then rental value of the demised premises for what would have constituted the remainder of said term were it not for such termination, shall be deemed prima facie to be the rental realized upon any reletting if such reletting be accomplished by Lessor within six (6) months after such termination, and the then present cash value of future rent and future rental value shall be deemed to be such sums as invested at four per cent (4%) simple interest will produce the future rent or rental value, as the case may be, over the period of time in question; or

(b) Relet the demised premises as the agent and for the account of Lessee upon such terms as Lessor may deem advisable, in which event, the rents received on such relettings shall be applied, first, to the expenses, if any, incurred

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by Lessor for necessary decorating and repairs in connection with the demised premises, or by reason of the breach of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, and all expenses reasonably incurred in recovering possession of the demised premises, including all costs and commissions of such reletting, and all attorneys' fees in connection with such termination or reletting, and thereafter toward the payment of all sums due or to become due to Lessor hereunder, and if a sufficient sum shall not be thus realized to pay the rent and other charges herein provided for, Lessee shall pay to Lessor monthly, the monthly deficiency, if any, and Lessor may sue for each monthly deficiency monthly as it shall arise, and any suit brought to enforce the collection of the amount of the deficiency for any month shall not prejudice in any way the right of Lessor to enforce collection of the deficiency for any subsequent month by a like or similar proceeding, and if there shall be any over-plus the same shall be paid to Lessee.

It is agreed that in reletting under any of the provisions of this Article, Lessor shall have, and Lessor is hereby given, the optional right to relet the demised premises, or any part thereof, either in the name of Lessor or otherwise, for a term or terms which may, at Lessor's option, exceed or be

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Plaintiffs' Exhibit No. 1—(Continued)

less than the period which would have constituted the balance of the term of this lease but for such termination.

Lessee shall indemnify Lessor against, and shall pay and discharge any and all reasonable or proper costs and expenses (including all reasonable attorneys' and counsel fees) that may at any time or times result from, or arise out of, or that Lessor may be put to, sustain or incur by reason of any default or failure on the part of Lessee to comply in any respect with, or to observe any requirement or provision of this lease, or that Lessor may sustain, or be put to, or incur, in enforcing or properly seeking to enforce, any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings hereof. And if any suit or action shall be commenced against Lessor by Lessee, or any assignee or subtenant of Lessee, in respect of any matter arising out of this lease, and Lessor shall wholly or partly prevail in any such suit or action, then and in such an event, Lessee shall also pay the costs and expenses of Lessor in connection with any such suit or action, together with Lessor's reasonable attorneys' and counsel fees therein. Whenever such attorneys' or counsel fees are paid or incurred by Lessor in connection with any court proceeding whatsoever in respect of any matter arising out of this lease, the reasonable amount thereof shall, if possible, be determined and fixed by the court having jurisdiction of any such court proceeding.

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Plaintiffs' Exhibit No. 1—(Continued)

Recourse by Lessor to any deposit, guaranty, collateral engagement, or other security for Lessee's performance of all or any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings herein shall be cumulative, independent of and in addition to any and all other rights and remedies of Lessor, whether contained in this lease or in another instrument or otherwise, or provided for by law, and Lessor shall not be required to exhaust or look to any such security before exercising or prosecuting any of such other rights or remedies. Lessor may transfer and/or deliver any such security, as such, to the purchaser of the reversion in the event that the reversion be sold, and thereupon Lessor shall be discharged from any further liability in reference thereto. No delay of Lessor in enforcing any right, remedy, privilege or recourse accorded to Lessor, or which Lessor may become entitled to recoveries thereon, shall affect, impair, diminish, suspend or exhaust any of such rights, remedies, priviliges or recourses. In the event of a breach or threatened breach by Lessee of any of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease, Lessor shall be entitled to apply for and to obtain an injunction to prevent said breach or threatened breach, and Lessee hereby waives the benefit of every statute and/or rule declaring or defining either remedies or rights by or for injunction that may otherwise operate to prevent the issuance of any injunction against Lessee.

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Plaintiffs' Exhibit No. 1—(Continued)

If Lessee should make default in the fulfilling, keeping, observing, performing or abiding by of any or all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings in this lease set forth and contained on the part of Lessee to be fulfilled, kept, observed, performed and abided by, Lessor may, at Lessor's option, immediately, or at any time thereafter, without notice, perform same for the account of Lessee, and Lessee shall immediately, upon demand, pay Lessor the moneys expended and/or the expenses incurred by Lessor in connection therewith, or Lessor may, at its option, add the amount thereof to any subsequent installment of the hereinbefore reserved fixed rent, and Lessor shall have like remedies for default in payment thereof as Lessor would have in the event of a default in the payment of any installment of said fixed rent.

Article XXIX.

Cancellation of This Lease

Section 1. Lessee covenants and agrees that at all times during the hereinbefore demised term all of the issued and outstanding capital stock of Lessee shall be owned and held by Fanchon & Marco, Inc., the guarantor hereinbefore mentioned, or that a majority of said stock shall be owned and held by the persons constituting the owners and holders of a majority of the issued and outstanding capital stock of said Fanchon & Marco,

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Plaintiffs' Exhibit No. 1—(Continued)

Inc., as hereinafter provided, and that a majority of said stock of said Fanchon & Marco, Inc., shall at all such times be owned and held by Marco Wolff, Fanchon Simon, H. C. Arthur, Jr., Sam Dembow, Jr., and J. A. Partington, or by any three of them, and if at any time or times during the demised term either: (a) the capital stock of Lessee or a majority of the capital stock of said Fanchon & Marco, Inc., shall cease to be so owned and held, whether due to the voluntary act of any one or more of the aforementioned parties, or by operation of law; or (b) if less than two of said persons hereinabove named shall be in actual charge of the conduct, management or operation of the theatre on the demised premises or the booking or contracting of motion pictures to be exhibited thereat; or (c) Lessee shall merge, combine or consolidate with any other firm or corporation or enter into an arrangement by which the motion picture photoplays to be exhibited at the theatre on the demised premises shall be contracted for or booked for exhibition by any one person, firm or corporation other than by Lessee and at least two of said persons hereinabove named; or (d) Lessee or said Fanchon & Marco, Inc., shall have forfeited or lost its charter and such forfeiture shall not have been rescinded or set aside or said charter not renewed within thirty (30) days thereafter; or (e) that certain franchise agreement dated as of September 1, 1939, by and between Lessor and Lessee, relating to the exhibition in the demised premises of motion

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Plaintiffs' Exhibit No. 1—(Continued)

pictures generally released as "Paramount Pictures," to be entered into simultaneously with the execution and delivery of this lease, be cancelled or terminated for any reason whatsoever, then and in any of said events, Lessor may, at its option, give Lessee a written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised brought to an end by lapse of time upon the third day thereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee hereby agrees to vacate and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, three (3) days after the mailing of such notice.

Section 2. In the event that said franchise agreement dated as of September 1, 1939, shall hereafter be cancelled and terminated for some reason or cause other than an act of omission by or default or breach thereunder upon the part of Lessee, and this lease be not cancelled and terminated by Lessor, then and in such an event,

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Plaintiffs' Exhibit No. 1—(Continued)

Lessee may, at its option, give Lessor a written notice stating that by reason thereof the term of this lease shall cease and expire three (3) days from the date of the mailing of same, and upon the mailing of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised brought to an end by lapse of time upon the third day thereafter, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term, and Lessee hereby agrees to vacate and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, three (3) days after the mailing of such notice.

Section 3. Lessor shall have the right to cancel this lease on August 31, 1944, by giving at least twelve (12) months' prior written notice to Lessee of its intention so to do, and upon the giving of such notice this lease shall cease and expire and be cancelled and terminated and the term hereby demised be brought to an end by lapse of time at the close of business on August 31, 1944, as fully and completely as if that day were the date in this lease distinctly fixed for the expiration of the demised term and Lessee hereby agrees to vacate

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Plaintiffs' Exhibit No. 1—(Continued)

and surrender the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, at the close of business on August 31, 1944.

Section 4. Lessor shall have the right to cause the whole or any part of the land and building constituting the demised premises to be sold and disposed of, free from the leasehold estate created by this lease, at any time during the term hereof after August 31, 1941. Lessor agrees that in the event that it shall enter into any bona fide contract of sale of said property free of this lease, it will forthwith send notice to such effect to Lessee and fix in the said notice a date, not less than six (6) months after the date of the notice, on which the term hereof shall cease and determine, and Lessee agrees that promptly on the date so fixed for the termination of this lease it will surrender and yield up the demised premises, together with the furnishings, fixtures, personal property and equipment, including, but not by way of limitation, any and all substitutions therefor or replacements therein, by whomsoever made, listed in the inventory referred to in the second paragraph of Article XIV hereof, and upon the giving of such notice the term of this lease shall automatically cease and

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Plaintiffs' Exhibit No. 1—(Continued)

determine on the date fixed by such notice with the same force and effect as if such date of termination were the date originally limited for the duration of the term hereof. If the demised premises shall be sold or disposed of free of this lease, Lessor agrees that suitable provision shall and will be made in the deed to the purchaser, by a covenant running with the land, restricting the future use of such property by the purchaser and the latter's heirs, successors and assigns to non-theatrical purposes for a period of years equal to the unexpired balance of the original term of this lease.

Article XXX.

Services and Payment Therefor

In connection with the obligation imposed upon Lessee to pay for the water and heat supplied to the demised premises, and the operation and servicing of the theatre air conditioning plant and the mechanical equipment now servicing the theatre located in the boiler room of the building, it is deemed advisable that said water and heat and any power current necessary for the operation of said plant and equipment be purchased by Lessee from Lessor, and that operation and servicing of said plant and equipment be handled by Lessor's employees for Lessee's account, and Lessee pay Lessor for both as hereinafter provided. Accordingly, Lessor agrees to furnish said water and heat (heat during the usual season only), and operate and service said plant and equipment, and Lessee, on

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Plaintiffs' Exhibit No. 1—(Continued)

its part, agrees to pay Lessor therefor the sum of Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) during each and every lease year of the demised term, and a pro rata thereof for any part or portion of the demised term comprising less than a full year, increased or decreased, as the case may be, as hereinafter provided, in equal weekly installments, in advance, with each weekly installment of the hereinbefore reserved fixed rent; and in addition thereto, Lessee agrees to pay Lessor, from time to time, as and when Lessor makes demand therefor, the amount of the cost of the supplies necessary for operating said plant and equipment, and the amount of the cost of any and all repairs and replacements required to be made to either or both, and Lessor shall have like remedies for default in payment of any of the herein referred to items as Lessor would have in the event of a default in the payment of any installment of said reserved fixed rent. It is further agreed that said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item has been determined on the basis of the 1938 calendar year labor and materials costs; that should there be any increase or decrease in said costs, or any of them, said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item shall be increased or decreased, as the case may be, under an adjustment had at the end of the lease year during which the increase or decrease in question

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Plaintiffs' Exhibit No. 1—(Continued)

occurred, the amount of the adjustment to be determined and fixed in like manner as said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item was determined and fixed; that when such adjustment is made a cash settlement shall forthwith be made for the amount of the net increase or net decrease in said costs during such preceding lease year, and that the adjusted amount of such item shall thereafter be payable by Lessee to Lessor, subject to further increase or decrease, as the case may be, as hereinabove provided; and that Lessor shall be under no liability whatsoever should it become necessary, at any time, to suspend operation of said plant and/or equipment, and in the event of any such suspension, Lessee shall not be entitled to any damages whatsoever, nor to any abatement in or diminution of the hereinbefore reserved rent and/or said Seven Thousand Four Hundred and Sixty-Four Dollars and Thirty Cents ($7,464.30) item, whether or not the latter be increased or decreased, as aforesaid. Lessor agrees to furnish electric power current required for the operation of said theatre air conditioning plant and mechanical equipment, it being expressly understood that electric power current supplied by Lessor as herein provided shall be paid for separately by Lessee, all in accordance with the provisions of Article IV hereof, such pay-

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Plaintiffs' Exhibit No. 1—(Continued)

ment to be in addition to the payments provided for in this Article XXX.

Notwithstanding any other provisions contained in this lease, it is expressly understood and agreed that if at any time when other means for obtaining the same (directly or through any other person, firm or corporation) are available to Lessee, Lessor shall, in its exclusive discretion, deem it inadvisable to furnish water and heat to the demised premises and to operate and service the theatre air conditioning plant and mechanical equipment now servicing the theatre, Lessor shall have the right, upon not less than thirty (30) days' previous notice in writing to Lessee, to wholly discontinue the furnishing of such water and heat and the operation and servicing of said plant and equipment, and upon the giving of such notice, and the expiration of such period of not less than thirty (30) days, Lessor shall be released and discharged from any further obligation to furnish the water, heat, operation and servicing provided for by this Article XXX and Lessee shall be released and discharged from its obligation to pay Lessor any sums therefor accruing from and after the date of the discontinuance of the furnishing thereof, it being agreed that Lessee thereupon shall have the right to contract or otherwise arrange with any other person, firm or corporation for the further supply of such water and heat and the further operation and servicing of said plant and equipment.

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Plaintiffs' Exhibit No. 1—(Continued)

Article XXXI.

Interpretations

The language in all parts of this lease shall in all cases be construed as a whole and simply according to its fair meaning and not strictly for or against either Lessor or Lessee.

Wherever in this lease any words of obligation or duty regarding either party are used, such words or expressions shall have the same force and effect as though made in the express form of covenants.

Each and all of the terms, covenants, conditions, agreements, obligations, provisions and undertakings of this lease shall inure to the benefit of and shall bind (as the case may be), not only the parties hereto, but each of their respective successors and assigns; and whenever and wherever a reference is made to Lessor or to Lessee, such reference shall be deemed to include the successors and assigns of Lessor or Lessee, as the case may be, provided, however, that nothing contained in this paragraph or provision shall be construed to permit or validate any assignment of any interest of Lessee contrary to the provisions hereinbefore set forth with respect to assignment by Lessee.

No caption of any article of this lease is intended, nor shall the same ever be construed so as to either change, limit, modify or control the text of the particular article to which it relates.

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Plaintiffs' Exhibit No. 1—(Continued)

Article XXXII.

Further Right of Entry, Etc.

Supplementing the provisions of Article VIII hereof, all of the persons enumerated in said Article shall have the further right to enter upon the demised premises at all reasonable hours (a) during the demised term, for the purpose of exhibiting same to prospective purchasers or prospective mortgagees; or (b) during the last six (6) months of the demised term, for the purpose of exhibiting same to persons wishing to rent; or (c) at any time during the demised term, for the purpose of serving or posting and keeping posted thereon, any notice provided for by Section 1192 of the Code of Civil Procedure of the State of California, and any other notice or notices that may at any time be required or permitted by any other law relating to or in anywise affecting the liability of Lessor, or the owner of the fee or any mortgagee or trustee under a deed of trust constituting a lien on the demised premises, for labor performed or materials furnished in and about any alteration and repair of the demised premises, at the instance of any person other than Lessor, or the owner of the fee or such mortgagee or trustee.

In Witness Whereof, Lessor and Lessee have caused their respective corporate seals to be hereunto affixed and this instrument to be executed by their respective corporate officers thereunto duly

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Plaintiffs' Exhibit No. 1—(Continued)

authorized, all as of the day and year first above named.

PARAMOUNT PICTURES, INC.

By /s/ AUSTIN KEOUGH,
Vice-President.

Attest:
[Seal] /s/ NORMAN COLLYER,
Asst. Secretary.

PARTMAR CORPORATION,

By /s/ J. A. PARTINGTON,
President.

Attest:
[Seal] /s/ SAMUEL SHOYAN,
Asst. Secretary.

State of New York,
County of New York—ss.

On this 7th day of Sept., 1939, before me, Anna G. Vidich, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared Austin C. Keough, known to me to be a Vice-President, and Norman Collyer, known to me to be an Assistant Secretary, of Paramount Pictures Inc., one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

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Plaintiffs' Exhibit No. 1—(Continued)

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ ANNA G. VIDICH,
Notary Public in and for
Said County and State.

State of New York,
County of New York—ss.

On this 30th day of August, 1939, before me, Garfield Farber, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared J. A. Partington, known to me to be the President, and Samuel Shoyan, known to me to be the Asst. Secretary, of Partmar Corporation, one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ GARFIELD FARBER,
Notary Public in and for
Said County and State.

Admitted November 14, 1950.

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PLAINTIFFS' EXHIBIT No. 2

This Agreement, made and entered into as of the 1st day of September, 1942, by and between Paramount Pictures, Inc., a corporation organized and existing under the laws of the State of New York and duly qualified to do business in the State of California, party of the first part, hereinafter called "Lessor," and Partmar Corporation, a corporation organized and existing under the laws of the State of California, party of the second part, hereinafter called "Lessee."

Witnesseth:

Whereas by a certain Indenture of Lease, dated as of January 1, 1939, between the parties hereto (the said Indenture of Lease being by this reference thereto made a part of this Agreement as though here fully set forth at length and being hereinafter referred to as the "Lease"), the Lessor leased to the Lessee the theatre portion of the Paramount Theatre Building, Los Angeles, California, together with the equipment therein, for a term commencing on January 1, 1939, and ending on August 31, 1949 (unless sooner terminated as set forth in the Lease), and

Whereas the parties have agreed upon certain amendments of the lease, all as hereinafter set forth.

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto hereby covenant and agree as follows:

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Plaintiffs' Exhibit No. 2—(Continued)

1. The paragraph in the Lease reading as follows:

> "To Have and to Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 31st day of August, 1949, unless said term shall be sooner terminated as hereinafter set forth."

is hereby amended so as to read as follows:

> "To Have and to Hold said premises, with all rights, privileges, easements and appurtenances thereunto belonging or in anywise appertaining, together with the furnishings, fixtures, personal property and equipment now therein contained, unto Lessee, for a term commencing as of the 1st day of January, 1939, and ending on the 18th day of March, 1952, unless said term shall be sooner terminated as hereinafter set forth."

2. Section (b) of Article II of the Lease is hereby amended so as to read as follows:

"(b) For and during each period of twelve (12) calendar months from September 1st to August 31st thereafter and for during the period of the demised term hereof commencing September 1, 1951, and ending on March 18, 1952 (each such period being

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Plaintiffs' Exhibit No. 2—(Continued)

herein sometimes referred to as a 'lease year'), a fixed weekly rental of Two Thousand Two Hundred Dollars ($2,200) for each lease week, payable in advance, on the first day of each and every such week, commencing on September 1st of each lease year, and pro rata of Two Thousand Two Hundred Dollars ($2,200) as the fixed rent for any number of days less than a full week, payable in advance on the first of said days, and should a sum equivalent to the total of:

"(i) fifteen per cent (15%) of the 'gross receipts' during the portion of such lease year that the theatre in the demised premises shall be operated on a 'straight picture policy,' plus

"(ii) twelve and one-half per cent (12½%) of the 'gross receipts' during the portion of such lease year that the theatre in the demised premises shall be operated on a 'stage show policy,' exceed the aggregate amount of the fixed rent payable during such lease year, then, and in such event, an additional sum equivalent to the excess thereof, over and above the aggregate amount of the fixed rent for such lease year, payable on the 15th day immediately following the last day of such lease year."

3. In the sixth paragraph from the end of Article II of the Lease the last sentence thereof reading as follows:

"The remaining audits shall be furnished on

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Plaintiffs' Exhibit No. 2—(Continued)

or before the 15th day of September of each subsequent lease year, commencing on or before September 15, 1940, and each thereof shall respectively cover the immediately preceding twelve (12) month period of time, commencing with September 1st of the preceding calendar year and ending with August 31st of the same calendar year within which such respective audit is to be furnished."

is hereby amended so as to read as follows:

"The remaining audits shall be furnished on or before the 15th day immediately following the end of each lease year, commencing with the lease year ending August 31, 1940, and each such audit shall cover the immediately preceding lease year."

4. Effective September 1, 1942, the following new Article IIa is hereby inserted in the Lease, immediately succeeding the end of Article II of the Lease:

Article IIa

Additional Rent

In addition to the rental provided for in Article II of this lease, the Lessee shall pay to the Lessor as rental commencing September 1, 1942, and continuing during the remainder of the term of this lease (except as hereinafter otherwise provided) fifty per cent (50%) of the "net receipts" (as such

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Plaintiffs' Exhibit No. 2—(Continued)

term is hereafter defined) from the operation of the demised premises, as follows:

For all of the purposes of this Article IIa:

(1) The term "operating expenses" shall be deemed to mean all items of expenses actually and properly incurred or accrued, commencing September 1, 1942, by the Lessee in the operation of the demised premises, including, but not being limited to, the following items:

(a) Film rentals;

(b) Salaries of performers, musicians and stage hands;

(c) Production cost of stage shows, excluding salaries of performers, musicians and stage hands, but including cost of rental of scenery, stage properties and costumes, and salary expense for production, direction and supervision. (It is agreed that the said production cost, as and when and during the time (but only as and when and during the time) that stage shows which are produced, directed and supervised by Fanchon Simon are played in the demised premises, shall be taken at the sum of $1,000 per week (of which sum $300 per week shall be allocated to salary expenses of Fanchon Simon for production, direction and supervision by her) during the two year period commencing September 1, 1942; and during each year thereafter such a sum per week as may be agreed upon between the Lessor and the Lessee in writing,

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Plaintiffs' Exhibit No. 2—(Continued)

or if they cannot so agree, as may be fixed by
tration as hereinafter provided. If stage shows
played in the demised premises for any consecu
period of at least four weeks, Fanchon Simon
be deemed to have produced, directed and su
vised the same even though, due to illness or
porary absence from Los Angeles, she shal
absent from the demised premises and from
performance of her duties in connection with
production, direction and supervision during
more than twenty-five per cent of any such
secutive period. It is further agreed that, as
when and during the time (but only as and
and during the time) that stage shows which
produced, directed and supervised by someone o
than Fanchon Simon are played in the dem
premises, the said production cost shall be t
at a weekly sum during each year (from Septe
1st to September 1st) as may be agreed upon
tween the Lessor and the Lessee in writing,
they cannot so agree, as may be fixed by arbitra
as hereinafter provided. Any said arbitration
be conducted in Los Angeles as follows: The Le
or the Lessee may by notice served on the o
appoint one arbitrator and call upon the othe
appoint a second arbitrator within five days a
the receipt of such notice; and each party ag
that on receiving any such notice it will so app
an arbitrator. The two arbitrators thus appoi
shall, within five days after the appointment of
one last appointed jointly appoint a third arbi

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Plaintiffs' Exhibit No. 2—(Continued)

tor. The decision of a majority of the two arbitrators, rendered in writing, shall be final, conclusive and binding upon the Lessor and the Lessee. The Lessor and the Lessee shall each bear one-half of the compensation and expenses of the arbitrators);

(d) Salaries of all persons actually employed in the said theatre, such as manager, booker (while, but only while, stage shows are played in the demised premises), assistant manager, cashiers, doormen, engineers, ushers, cleaners, projection and soundmen, etc., but not including salaries paid to any person for production and direction of stage shows. (For the purposes hereof, unless the Lessor shall otherwise agree in writing, the manager's salary shall not be in excess of $150.00 per week, the booker's salary (which shall be payable only while stage shows are played in the demised premises) shall not be in excess of $140.00 per week, and no other employee, other than union labor, shall be paid a salary in excess of $60.00 per week);

(e) Cost of newspaper and other advertising. (The Lessor and the Lessee shall agree on the top limit of the advertising expense during each year, commencing with the year beginning September 1, 1942. If they cannot so agree upon such top limit for any such year, the same shall be fixed by arbitration in the manner set forth in paragraph (c) above);

(f) Telegraph, telephone and postage expended in the actual conduct and operation of the demised

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Plaintiffs' Exhibit No. 2—(Continued)

premises by the Lessee; cost of uniforms and cleaning; cost of forms.

(g) Service fees on signs, sound and other equipment. (For the period from September 1, 1942, through November 30, 1944, these service fees shall include, but not be limited to, the sum of $1,200 per year, being the amount for such period hereby allocated to maintenance expense under that certain agreement, dated November 29, 1939, between Fanchon & Marco, Inc., and Electrical Products Corporation (which agreement relates to vertical and marquee displays on the demised premises), and this regardless of the fact that such maintenance expense may have been capitalized on the books of the Lessee;

(h) Fees payable to the American Society of Composers, Authors and Publishers, and like organizations; license fees and inspection fees payable to any governmental subdivision; social security taxes; occupation taxes; personal property taxes; parking fee expense; donations to charities (which donations, for the purposes hereof, shall not, unless the Lessor shall otherwise agree in writing, be in the aggregate in excess of $250 per year);

(i) Cost of electricity, fuel, heat, steam, refrigeration and gas;

(j) Premiums on policies of public liability, elevator, boiler or explosion, safe, burglary, hold-up,

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Plaintiffs' Exhibit No. 2—(Continued)

and workmen's compensation, insurance, and fidelity bonds; premiums on fire insurance policies covering equipment;

(k) Cost of minor replacements and repairs charged to current expense;

(l) Cost of annual audit by a firm of certified public accountants, and the cost of any "third audit" requested by the Lessor as hereinafter provided for.

(m) Five per cent of the "gross receipts" (as such term is defined in Article II hereof and which definition shall apply whenever such term is hereinafter used) to cover all of the expenses of the Lessee in connection with the keeping of the books, accounts and records, general office overhead, buying and booking of pictures, and management generally;

(n) Rental is provided for in Section (b) of Article II of this lease:

(o) Depreciation or amortization as follows, applicable to the improvements which the Lessee has made in the demised premises through August 31, 1942:

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Plaintiffs' Exhibit No. 2—(Continued)

Year Commencing Sept. 1 and Ending August 31	Amount to Be Depreciated or Amortized in Such Year
1942-3	$10175.33
1943-4	10175.33
1944-5	9958.81
1945-6	9850.56
1946-7	9709.42
1947-8	8764.01
1948-9	8291.24

(p) Depreciation or amortization on the cost to the Lessee of alterations, repairs or replacements (excluding minor repairs and replacements charged to current expense) made by the Lessee in the demised premises on and after September 1, 1942 (provided the same are made in accordance with the applicable provisions of this lease), at the usual rates in accordance with sound accounting practice.

Any rebates, allowances or refunds allowed or obtained by the Lessee on any item of operating expense will be applied to and deducted from "operating expenses" so as to reduce the same by the amount thereof.

The expression "operating expenses" shall not be deemed to include any interest, or (except as above specified) any depreciation, amortization, home office or district office overhead, management or officer's salaries, insurance, alterations, repairs or replacements, or taxes of any nature.

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Plaintiffs' Exhibit No. 2—(Continued)

(2) The term "net receipts" shall be deemed to mean the excess, commencing September 1, 1942, of the "gross receipts" over the "operating expenses."

(3) The term "net losses" shall be deemed to mean the excess, commencing September 1, 1942, of the "operating expenses" over the "gross receipts."

On or before the twentieth day after the end of each month (commencing with the month of September, 1942) the Lessee shall cause to be prepared and shall deliver to the Lessor an operating statement for such month, such operating statement to show the "gross receipts" and the "operating expenses" for such month. If such operating statement shows "net receipts" for such period the Lessee shall, concurrently with the delivery of such statement to the Lessor, pay as rent one-half of the amount of such "net receipts" to the Lessor.

For each lease year (as the term "lease year" is defined in Section (b) of Article II of this lease and in which sense, except as hereinafter expressly provided, such term is hereinafter used in this Article IIa) the Lessee, as promptly as possible after, and in any event not later than sixty days after the end of each year, shall cause an independent audit to be made by a firm of certified accountants acceptable to the Lessor, covering the lease year in question, and a certified copy thereof to be delivered to the Lessee. (Upon the termination

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Plaintiffs' Exhibit No. 2—(Continued)

of this lease otherwise than by lapse of time, or upon the exercise by the Lessor of its option hereinafter in this Article IIa provided, such audit shall be so made and delivered for the period from the commencement of the then current lease year to and including the said termination date of this lease or the effective date set forth in the notice from the Lessor exercising its said option, and such applicable period shall be deemed to constitute the then current lease year.) Each such audit shall be with respect to the items set forth, or which should have been set forth, in the monthly operating statements of the Lessee during the lease year covered thereby. Unless Lessor, within sixty days after the receipt of any such audit, shall serve a notice on the Lessee that it is dissatisfied with such audit, the same shall be final and binding upon the Lessor and the Lessee, and they shall make final adjustment and settlement each with the other, as provided for in this Article IIa, for the lease year covered by such audit, in accordance with such audit. If Lessor shall serve such notice on the Lessee within the time limit aforesaid, Lessor shall have the right to make a second audit at its own expense, and if Lessor and Lessee be then unable to compose and adjust their differences within a reasonable time after the second audit shall have been completed, a third audit shall be made by Price Waterhouse & Co., or (if the Lessor does not wish Price Waterhouse & Co.) by some other firm of certified public accountants selected by the

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Plaintiffs' Exhibit No. 2—(Continued)

Lessor and acceptable to the Lessee, the expense of which third audit shall be divided between the Lessor and the Lessee, and which third audit shall be final and binding upon the Lessor and the Lessee, who shall make final adjustment and settlement each with the other, as provided for in this Article IIa, for the lease year in question, in accordance with such audit. All payments due from the Lessee to the Lessor under the provisions of this paragraph shall be considered as being owing as rent hereunder.

The Lessee shall furnish to the Lessor as soon as possible after the close of each week (commencing with the week ending September 8, 1942), and in any event not later than five days thereafter, a detailed statement of the "gross receipts" and "operating expenses" during such week. The Lessee shall also furnish the Lessor with a daily statement of the "gross receipts" for the preceding day.

The Lessee agrees that it will keep in St. Louis, Mo., or, if the Lessor so requests, in Los Angeles, Cal., accurate books of account, vouchers and other records showing all items of "gross receipts" and "operating expenses," and that the Lessor, or its representatives, shall have the right during usual business hours to inspect, make copies of, examine and audit the said books of account, vouchers and other records. The Lessee agrees that, if at any time or from time to time the Lessor so requests, the Lessor shall have the right to appoint a representative to act with the Lessee in the keeping of the

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Plaintiffs' Exhibit No. 2—(Continued)

said books of account, vouchers, and other records, one-half of whose salary (which shall not be in excess of $75.00 per week) shall be paid by the Lessee and which amount so paid by the Lessee shall be considered as an item of "operating expenses."

The parties hereto intend and agree that one-half of the "net losses," if any, from time to time incurred shall be applied against, and reduce accordingly, both one-half of the "net receipts" and the rental provided for in Article II of this lease, whether theretofore paid by the Lessee to the Lessor or whether to accrue and to be paid by the Lessee to the Lessor, as follows: If any operating statement above provided for shows "net losses" for the month covered thereby, the Lessee shall deduct one-half of the amount of such "net losses" from the next accruing fixed weekly rentals and percentage rental provided for in Article II of this lease and/or from the next accruing amounts of "net receipts" due the Lessor as shown by subsequent operation statements rendered the Lessor as provided for in this Article IIa. If at the end of any lease year the Lessee has not been so reimbursed for one-half of the "net losses" incurred in such year, then the Lessor shall pay to the Lessee the balance of the one-half of such "net losses" not so reimbursed to the Lessee but in no event shall the amount so to be paid to the Lessee exceed the net amount of the rental payments theretofore received by the Lessor under this lease (viz, all

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Plaintiffs' Exhibit No. 2—(Continued)

payments made by the Lessee to the Lessor under the provisions of Article II and this Article IIa through the end of such lease year, less all sums theretofore paid by the Lessor to the Lessee by way of reimbursement for all previous lease years); and if the Lessee is not thus reimbursed in full for the one-half of the "net losses" incurred in such lease year, then the Lessee shall deduct the remaining balance (as to which it still has not been reimbursed) of the one-half of such "net losses" from the fixed weekly rentals and percentage rental provided for in Article II of this lease next accruing after the end of such lease and/or from the next accruing amounts of "net receipts" due the Lessor as shown by the operating statements subsequent to the end of such lease year rendered the Lessor as provided for in this Article IIa.

In the event that during the term of this lease the demised premises shall be damaged by fire, earthquake or other catastrophe and in the event that the Lessor does not thereupon terminate this lease as provided for in Article XII hereof, then, during the period (but only during the period) while the Lessor is making repairs and until the resumption of public performances in the demised premises, the rights and obligations of the Lessor and the Lessee respectively hereinbefore set forth in this Article IIa shall be suspended and be of no force or effect.

In the event that during the term of this lease the theatre constituting the demised premises should

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Plaintiffs' Exhibit No. 2—(Continued)

be closed by reason of epidemic, strikes, or the making of repairs or alterations as provided for in this lease, then, while (but only while) the said theatre is so closed, the rights and obligations of the Lessor and the Lessee respectively hereinbefore set forth in this Article IIa shall be suspended and be of no force or effect.

The expression "Accumulated Net Loss" at any particular time (which shall always be the close of the last day of a month) during the term of this lease shall mean (a) the "net losses" from the beginning of any lease year during the term of this lease through the end of any particular month in such lease year (such lease year being hereinafter referred to as the "particular year"), plus (b) the "net losses" for each prior lease year during that part of the term of this lease commencing September 1, 1942, except that, if with respect to any such prior lease year, there should be "net receipts" for any lease year or years subsequent thereto (but prior to the "particular year"), such "net receipts" shall be applied against and reduce pro tanto or eliminate the said "net losses" for such prior lease year. By way of illustration:

(i) If, in the lease year commencing September 1, 1942, for the period from the commencement of such year through June 30, 1943, the "net losses" amount to $25,000, then the "Accumulated Net Loss" on June 30, 1943, will be $25,000.

(ii) If, in the lease year commencing Septem-

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Plaintiffs' Exhibit No. 2—(Continued)

ber 1, 1943, for the period from the commencement of such year through April 30, 1944, the "net losses" amount to $65,000,

And if for the lease year ending August 31, 1943, the "net losses" amounted to $35,000, then the "Accumulated Net Loss" on April 30, 1944, will be $100,000;

Or, if for the lease year ending August 31, 1943, the "net receipts" amounted to $25,000, then the "Accumulated Net Loss" on April 30, 1944, would be $65,000.

(iii) If, for the lease year ending August 31, 1945, the "net losses" amount to $50,000,

And if for the lease year ending August 31, 1943, the "net receipts" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net losses" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1945, would be $90,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1945, would be $50,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $40,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $15,000, then

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Plaintiffs' Exhibit No. 2—(Continued)

the "Accumulated Net Loss" on August 31, 1945, would be $75,000.

(iv) If for the lease year ending August 31, 1946, the "net losses" amount to $40,000,

And if for the lease year ending August 31, 1943, the "net receipts" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net losses" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net losses" amounted to $20,000 then the "Accumulated Net Loss" on August 31, 1946, would be $100,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net losses" amounted to $50,000, then the "Accumulated Net Loss" on August 31, 1946, would be $90,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $15,000, and if for the lease year ending August 31, 1944, the "net receipts" amounted to $40,000, and if for the lease year ending August 31, 1945, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1946, would be $40,000;

Or, if for the lease year ending August 31, 1943, the "net losses" amounted to $20,000, and

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Plaintiffs' Exhibit No. 2—(Continued)

if for the lease year ending August 31, 1944, the "net losses" amounted to $25,000, and if for the lease year ending August 31, 1945, the "net receipts" amounted to $40,000, then the "Accumulated Net Loss" on August 31, 1946, would be $45,000.

In the event that the "Accumulated Net Loss" at the close of the last day of any month during the term of this lease shall be in the amount of Two Hundred Thousand Dollars ($200,000) or more, then the Lessor shall have the right, by notice given to the Lessee not later than the sixtieth day following the last day of such month, to elect that, commencing on the first day of the month next succeeding the month in which such notice was given, this Article IIa shall be of no further force or effect and shall be considered as eliminated from this lease, and upon the service of such notice then, commencing on the first day of the month next succeeding the month in which such notice was given, this Article IIa shall cease to be of any further force or effect and shall be considered as eliminated from this lease and neither of the parties hereto shall, except as hereinafter in this Article IIa specifically provided, have any rights and obligations against or to the other with respect to any of the provisions set forth in this Article IIa, it being, however, agreed that all of the terms and provisions of this lease (except as set forth in this Article IIa) shall remain in full force and effect.

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Plaintiffs' Exhibit No. 2—(Continued)

If such notice is given, the parties hereto shall make all payments one to the other, in accordance with the provisions hereinbefore set forth in this Article IIa, for the period ending with the close of business on the last day of the month in which such notice was given.

5. In Section (c) of Article III and in Sections 1 and 2 of Article XXIX of the Lease reference is made to the franchise agreement, dated as of September 1, 1939, by and between the Lessor and the Lessee. All such references shall hereafter apply to the said franchise agreement, dated as of September 1, 1939, as amended by the agreement relating thereto, dated as of September 1, 1942, between the Lessor and the Lessee.

6. Under date of July 23, 1941, the memorandum referred to in Section 2 of Article VI of the Lease was entered into between the parties hereto, and the same is hereby in all respects approved.

The last sentence in the said Section 2 of Article VI of the Lease is hereby amended so as to read as follows:

> "Lessor hereby agrees that in the event it shall hereafter exercise its right to terminate this lease prior to August 31, 1949, in accordance with the provisions of clause (e) of Section 1 of Article XXIX hereof if such right shall be exercised solely by reason of a cancellation and termination of the franchise agreement dated as of September 1, 1939, as amended

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Plaintiffs' Exhibit No. 2—(Continued)

by the agreement dated as of September 1, 1942, therein referred to for some reason or cause other than an act of omission by or default or breach thereunder on the part of Lessee, or in accordance with the provisions set forth in Section 4 of Article XXIX hereof, or in the event that Lessee prior to August 31, 1949, shall exercise its right to terminate this lease in accordance with the provisions of Section 2 of Article XXIX hereof, Lessor shall pay over to Lessee upon the date of such termination a sum equal to the then unamortized total amount of the net cost incurred by the Lessee in connection with all of said improvements as certified in the memorandum between the parties hereto under date of July 23, 1941."

7. Section 3 of Article XXIX of the Lease is hereby deleted and stricken out.

8. Concurrently with the execution and delivery of this agreement, the Lessor has loaned to the Lessee the sum of Twenty-eight Thousand Dollars ($28,000), and the Lessee has executed and delivered to the Lessor its certain promissory note, dated September 1, 1942, to the order of the Lessor in such principal sum, and bearing interest at the rate of two (2) per cent per annum from September 1, 1942, and which promissory note shall be regarded as though the same were here fully set forth at length.

The Lessee covenants and agrees that, if the

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Plaintiffs' Exhibit No. 2—(Continued)

Lessee shall fail to make when due any payment of the principal of or interest under the said note, the entire unpaid balance of principal thereof, together with all unpaid accrued interest thereunder, may, at the option of the Lessor, be added to any subsequent instalment of the fixed rent due and payable as provided for in Article II of the Lease, and the Lessor shall have like remedies for default in payment thereof as the Lessor would have in the event of a default in the payment of any instalment of such fixed rent.

The Lease is hereby amended in accordance with the provisions of this Section 8.

9. The Lease, amended as hereinabove in this agreement provided, is hereby ratified, approved and confirmed.

In Witness Whereof, Lessor and Lessee have caused their respective corporate seals to be hereunto affixed and this instrument to be executed by their respective corporate officers thereunto duly authorized, this 18th day of January, 1943, as of the day and year first above written.

PARAMOUNT
PICTURES, INC.,
By /s/ LEONARD H. GOLDENSON,
Vice-President.

Attest:
[Seal] /s/ NORMAN COLLYER,
Asst. Secretary.

PARTMAR CORPORATION,

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Plaintiffs' Exhibit No. 2—(Continued)

By /s/ MARCO WOLFF,
Vice-President.

Attest:

[Seal] /s/ HARRY WALLEN,
Asst. Secretary.

State of New York,
County of New York—ss.

On this 18 day of January, 1943, before me, Anna G. Vidich, a notary public in and for the County of New York, residing therein, duly commissioned and sworn, personally appeared Leonard H. Goldenson, known to me to be a Vice-President, and Norman Collyer, known to me to be an Assistant Seceretary, of Paramount Pictures, Inc., one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ ANNA G. VIDICH,
Notary Public in and for
Said County and State.

State of California,
County of Los Angeles—ss.

On this 8 day of Feb., 1943, before me, P. P. Burch, a notary public in and for the County of

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Plaintiffs' Exhibit No. 2—(Continued)

Los Angeles, residing therein, duly commissioned and sworn, personally appeared Marco Wolff, known to me to be the Vice-President, and Harry Wallen, known to me to be the Asst. Secretary, of Partmar Corporation, one of the corporations that executed the within and foregoing instrument, and known to me to be the persons who executed the within instrument on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ P. P. BURCH,
Notary Public in and for
Said County and State.

My Commission expires July 12, 1945.

Admitted November 14, 1950.

PLAINTIFFS' EXHIBIT No. 3

Agreement made and entered into this 30th day of August, 1939, as of the 1st day of September, 1939, by and between Paramount Pictures, Inc., a New York corporation, party of the first part, (hereinafter referred to as "Paramount") and Partmar Corporation, a California corporation, party of the second part, (hereinafter referred to as the "Exhibitor").

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Plaintiffs' Exhibit No. 3—(Continued)

Witnesseth:

First: (a) Paramount hereby grants to the Exhibitor upon the terms and conditions hereinafter specified, a license under the respective copyrights of the sound photoplays licensed hereunder to exhibit at the Paramount Theatre, Los Angeles, California, the feature photoplays (to be selected as hereinafter provided), short subject photoplays and each issue of two editions of Paramount Sound News (except any and all photoplays excepted and excluded from this license and agreement pursuant to Article Second hereof) which shall be generally released by Paramount Pictures Inc., its successors or assigns, as "Paramount Pictures" or under the trade-mark "Paramount," or by any parent, subsidiary or affiliated company thereof now or hereafter formed to distribute or having the distribution rights of motion pictures generally released as "Paramount Pictures" under the trade-mark "Paramount" for exhibition at motion picture theatres in the United States during the period of ten (10) years commencing September 1, 1939, and ending August 31, 1949, (all of which photoplays are hereinafter referred to as "released by Paramount"), and hereby also grants a license (conditioned as hereinafter stated under the respective copyrights of any matter included in the sound recorded for any of said photoplays) to reproduce for public performance at said theatre such recorded sound in synchronism with the exhibition of such

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Plaintiffs' Exhibit No. 3—(Continued)

photoplays. The Exhibitor hereby accepts such license and agrees to comply with all of the terms and conditions thereof. It is agreed that any and all photoplays which may be pre-released or road-shown by or with the authority of Paramount or any parent, subsidiary or affiliated company thereof, shall not be deemed available for exhibition hereunder unless and until generally released for exhibition as aforesaid during the aforesaid ten (10) year period.

(b) For all purposes of this agreement each and every photoplay of the length of five thousand (5,000) feet or more released by Paramount as aforesaid during such ten (10) year period shall be deemed a feature photoplay, and each and every photoplay which shall not exceed approximately twenty-two hundred (2200) feet in length shall be deemed a short subject photoplay. It is agreed that this license shall not cover or apply to any and all photoplays the length of which shall exceed approximately twenty-two hundred (2200) feet and which shall be less than approximately five thousand (5,000) feet, except, however, that the Exhibitor may at its election exhibit such photoplays hereunder upon terms and conditions applicable to the feature photoplays licensed hereunder.

(c) For all purposes of this agreement each release year shall be deemed to commence on September 1st and end on August 31st of the next succeeding year unless Paramount shall during the

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Plaintiffs' Exhibit No. 3—(Continued)

ten (10) year period referred to in subdivision (a) of this Article First change the release year, in which event the release year shall, for the purposes of this agreement, be that which Paramount shall generally fix as a release year for the distribution of photoplays in the United States.

(d) For all purposes of this agreement the feature photoplays and short subject photoplays released by Paramount during the year beginning September 1, 1939, and ending August 31, 1940, shall be known and are referred to herein as "Group S-11 feature photoplays" and "Group S-11 short subject photoplays," respectively; and the feature photoplays and short subject photoplays released by Paramount in each successive release year of the balance of the ten (10) year period of this agreement shall be known and are referred to herein in like manner as "Group S-12" to "Group S-20," both inclusive, respectively.

Second: (a) It is agreed that there shall be excepted and excluded from this license agreement even though generally released for distribution during the aforesaid ten (10) year period all feature and short subject photoplays as to which Paramount is and/or shall be under contract with the producer of such photoplays or with any other party to obtain the consent or approval of such producer or other party to the terms and conditions of the licensing and/or exhibition thereof, unless Paramount obtains such consent or approval for

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Plaintiffs' Exhibit No. 3—(Continued)

the exhibition of such photoplays hereunder, which consent or approval Paramount agrees to use its best efforts to obtain.

(b) Paramount may exhibit and/or license the exhibition of any and all photoplays excepted and excluded from this license and agreement when and where desired by it and no rights whatsoever are granted hereunder to the Exhibitor as respects all photoplays so excepted and excluded.

Third: (a) The license to reproduce recorded sound is granted upon the Exhibitor's express warranty and upon condition: (1) that the sound reproducing equipment in said theatres will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality, whether recorded upon a print or upon records, discs or other similar devices; (2) if copyrighted musical compositions are included in such recorded sound, the Exhibitor now has or will have at the date or dates of the exhibition of each photoplay and the reproduction of the recorded sound therefor, an effective license from the copyright proprietor or from any licensee of the copyright proprietor to perform publicly the said copyrighted musical compositions.

(b) Paramount reserves the right to record the sound for reproduction in synchronism with the exhibition of such photoplays or any of them on the print thereof or on records, discs, or any other

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Plaintiffs' Exhibit No. 3—(Continued)

device, as Paramount may from time to time determine.

(c) All references hereinafter made to a print shall be deemed to include the records, discs and any other device upon which sound is recorded for reproduction in synchronism with the exhibition of a print.

Fourth: For the purpose of determining and computing the license fees to be paid by the Exhibitor for the license to exhibit the feature photoplays licensed hereunder released during each year of the aforesaid ten (10) year period and for all other purposes hereunder Paramount shall have the right (irrespective of the number of feature photoplays released by Paramount in each of such years and regardless of the classification thereof made by Paramount under any other agreement for any other theatre or theatres other than the theatre licensed hereunder) to classify from time to time the feature photoplays licensed for exhibition hereunder during each year of the said ten (10) year period.

Fifth: (a) The Exhibitor agrees to exhibit at the Paramount Theatre during each year of the ten (10) year period of this agreement such number of feature photoplays licensed hereunder as shall be necessary to consume not less than forty-six (46) weeks of playing time at the Paramount Theatre during each such year and to pay the license fees

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Plaintiffs' Exhibit No. 3—(Continued)

for not less than such number of feature photoplays.

(b) If during the remaining six (6) weeks of any yearly period of the term of this agreement the Exhibitor shall not exhibit any feature photoplays licensed hereunder, and shall exhibit feature photoplays not released by or through Paramount, then and in such event the Exhibitor agrees to pay to Paramount for each such week the sum of One Thousand Fifty Dollars ($1,050.00) on the first business day of each such week. The Exhibitor agrees that it will not exhibit such other feature photoplays not licensed hereunder for more than two (2) consecutive weeks during any month of any yearly period hereof.

(c) The Exhibitor agrees to exhibit each feature photoplay, short subject photoplay and newsreel licensed for exhibition hereunder for an exhibition period of not less than one (1) week, except that the Class A feature photoplay shall be exhibited for an exhibition period of not less than three (3) consecutive weeks. For the purposes of this agreement, a week shall be deemed to be seven (7) consecutive days as long as Sunday exhibitions are lawfully permitted, and if Sunday exhibitions are not lawfully permitted, a week shall be deemed to be six (6) consecutive days, except for any Sunday which may intervene. The Exhibitor shall have the right to exhibit any feature photoplay licensed hereunder for an additional period immediately following the

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Plaintiffs' Exhibit No. 3—(Continued)

first week's exhibition thereof, and such additional exhibition period shall commence on the morning immediately following the last evening's performance of the first week's exhibition.

(d) The license herein granted for the number of days exhibition provided for in this Article Fifth shall not be deemed to include the right of exhibition at any time during the respective exhibition periods prior to 6:00 a.m. nor after 1:00 a.m. following the midnight of the last date of exhibition herein provided for unless an express license therefor is granted by Paramount to the Exhibitor in writing, or any right of exhibition at any time other than on the respective date or dates of exhibition selected, designated or otherwise agreed upon as provided herein and confirmed in writing by Paramount, or any right of exhibition other than by means of a print or any such motion picture furnished to the Exhibitor by Paramount for the express purpose of exhibition hereunder in the Paramount Theatre as herein provided and confirmed in writing by Paramount.

Sixth: (a) The term "stage show," as used herein, shall mean the performance upon the stage of the Paramount Theatre by living persons of vaudeville, dramatic, operatic, orchestral, instrumental, vocal, or other similar forms of entertainment which shall require not less than thirty (30) consecutive minutes in the aggregate for presentation at each performance and for which stage show the Exhibitor shall actually expend a bona fide sum

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Plaintiffs' Exhibit No. 3—(Continued)

of not less than Four Thousand Five Hundred Dollars ($4,500.00) per week for performers, stage hands, orchestra and other expenses necessarily and directly incurred only in connection with such stage show, expressly excluding the cost of any advertising.

It is agreed and made the essence of this agreement that the stage shows to be presented by the Exhibitor at the Paramount Theatre shall be first class deluxe "Fanchon & Marco Stage Shows" or other deluxe stage show presentations of the highest class, suitable and desirable for presentation in a first-run motion picture theatre of the highest class in the United States.

(b) The term "stage show policy," as used herein, shall mean the operation of the Paramount Theatre with a program consisting of the presentation of stage shows as defined and described in subdivision (a) of this Article Sixth, together with the exhibition of feature photoplays licensed hereunder on the same program.

(c) The term "straight picture policy," as used herein, shall mean the operation of the Paramount Theatre with a program

(1) consisting exclusively of the exhibition of motion pictures licensed hereunder without stage shows; or

(2) consisting of the exhibition of motion pictures licensed hereunder in conjunction with

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Plaintiffs' Exhibit No. 3—(Continued)

other theatrical exhibition or form of entertainment performed by living persons on the stage, the cost of which shall be less than Four Thousand Five Hundred Dollars ($4,500.00) per week or which shall require less than thirty (30) consecutive minutes in the aggregate for presentation at each performance.

Seventh: The terms and conditions upon which the feature photoplays, released during the first year of the aforesaid ten (10) year period hereof, are licensed for exhibition hereunder during the operation of the Paramount Theatre on a stage show policy, shall be as follows:

(A) The feature photoplays released by Paramount during the first year of the ten (10) year period of this agreement shall be classified as follows, and Paramount shall have the right to designate the motion pictures licensed hereunder during such first year period to such classifications regardless of the classification made by Paramount under any other agreement:

One (1) Class A feature photoplay to be designated by Paramount;

Twenty (20) Class B feature photoplays to be designated by Paramount;

Sixteen (16) Class C feature photoplays to be designated by Paramount;

The remaining feature photoplays to be known as Class D feature photoplays, to be designated by Paramount.

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Plaintiffs' Exhibit No. 3—(Continued)

(B) The Exhibitor agrees to pay to Paramount as license fees for the license to exhibit the feature photoplays licensed hereunder released during the first year of the aforesaid ten (10) year period, the following sums:

(1) For the license to exhibit such Class A feature photoplay the Exhibitor agrees to pay to Paramount as license fees:

(a) For the first week's exhibition thereof a sum equal to thirty per cent (30%) of the gross receipts of the Paramount Theatre during such first week's exhibition period thereof until such gross receipts shall reach the sum of Twenty Thousand Dollars ($20,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Twenty Thousand Dollars ($20,000.00); and

(b) For the second week's exhibition thereof a sum equal to twenty-five per cent (25%) of the gross receipts of the Paramount Theatre during such second week's exhibition period thereof until such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Seventeen Thousand Dollars ($17,000.00); and

(c) For the third week's exhibition thereof a sum equal to twenty-five per cent (25%) of the gross receipts of the Paramount Theatre during such third week's exhibition period thereof until

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Plaintiffs' Exhibit No. 3—(Continued)

such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such gross receipts in excess of Seventeen Thousand Dollars ($17,000.00). Provided, however, that if the third week's gross receipts of the Paramount Theatre shall be less than the sum of Eighteen Thousand Dollars ($18,000.00) before deducting the cost of the stage show, as hereinafter provided, then and in such event the Exhibitor agrees to pay to Paramount in lieu of the license fees provided for hereinabove for the third week's exhibition, a sum equal to fifteen per cent (15%) of such third week's gross receipts without deduction being made from such gross receipts for the cost of the stage show.

In computing the license fee payable for each week's exhibition of the said Class A feature photoplay, the Exhibitor shall be entitled to first deduct from the weekly gross receipts the cost of the stage show (which cost shall be the minimum sum provided for in sub-division (a) of Article Sixth hereof), except however, that in no event shall the amount of such deduction exceed the sum of Forty-Five Hundred Dollars ($4,500.00) for any week notwithstanding that the actual cost of the stage show for such week may be in excess thereof.

(2) For the license to exhibit each such Class B feature photoplay the Exhibitor agrees to pay to Paramount a sum equal to twenty-five per cent (25%) of the weekly gross receipts of the theatre

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Plaintiffs' Exhibit No. 3—(Continued)

during the exhibition period thereof until such gross receipts shall reach the sum of Seventeen Thousand Dollars ($17,000.00), and a sum equal to fifty per cent (50%) of such weekly gross receipts in excess of Seventeen Thousand Dollars ($17,000.00); except however, that in computing the license fees payable for each such feature photoplay the Exhibitor shall be entitled to first deduct from the weekly gross receipts the cost of the stage show (which cost shall be the minimum sum provided for in sub-division (a) of Article Sixth hereof), the amount of such deduction during any week to be not more than Forty-five Hundred Dollars ($4500.00) notwithstanding that the actual cost of such stage show for such week may be in excess thereof.

Provided however, only with respect to four (4) Class B feature photoplays which Paramount shall designate, if the weekly gross receipts of the theatre during the exhibition of any such four (4) Class B feature photoplays shall be less than the sum of Eighteen Thousand Dollars ($18,000.00) before deducting the cost of the stage show, then and in such event the license fee payable in respect of such Class B feature photoplay shall revert to and the Exhibitor shall pay in lieu of the license fees provided hereinabove a sum equal to fifteen per cent (15%) of such weekly gross receipts during such week when such gross receipts shall be less than Eighteen Thousand Dollars ($18,000.00). In computing such reduced license fees no deduction

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Plaintiffs' Exhibit No. 3—(Continued)

shall be made from the gross receipts for the cost of the stage show.

(3) For the license to exhibit each such Class C feature photoplay, the Exhibitor agrees to pay to Paramount as license fees a sum equal to fifteen per cent (15%) of the weekly gross receipts of the Paramount Theatre during the exhibition thereof until such gross receipts shall reach the sum of Twenty-One Thousand Five Hundred Dollars ($21,500.00) and a sum equal to fifty per cent (50%) of such weekly gross receipts in excess of Twenty-One Thousand Five Hundred Dollars ($21,500.00). No deduction shall be made for the cost of the stage show in computing the license fees payable for such Class C feature photoplays.

(4) For the license to exhibit each such Class D feature photoplay the Exhibitor agrees to pay to Paramount as license fees the sum of One Thousand Fifty Dollars ($1,050.00) per photoplay.

Eighth: The terms and conditions upon which the feature photoplays released during the first year of the ten (10) year term hereof are licensed for exhibition during the operation of the Paramount Theatre on a straight picture policy shall be as follows:

(A) The feature photoplays released by Paramount during the first year of the ten (10) year period of this agreement shall be classified as follows, and Paramount shall have the right to designate the motion pictures licensed hereunder during

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Plaintiffs' Exhibit No. 3—(Continued)

such first year period to such classifications regardless of the classification made by Paramount under any other agreement:

One (1) Class A feature photoplay to be designated by Paramount;

Five (5) Class B feature photoplays to be designated by Paramount;

Twelve (12) Class C feature photoplays to be designated by Paramount;

Twelve (12) Class D feature photoplays to be designated by Paramount;

The remaining feature photoplays to be known as Class E, to be designated by Paramount.

(B) The Exhibitor agrees to pay to Paramount as license fees for the license to exhibit the feature photoplays licensed hereunder released during the first year of the aforesaid ten (10) year period, the following sums:

(1) For the license to exhibit such Class A feature photoplay, the Exhibitor agrees to pay to Paramount as a minimum license fee a sum equal to thirty-five per cent (35%) of the gross receipts of the Paramount Theatre during the exhibition period thereof until said gross receipts shall reach a split figure which will allow the Exhibitor to reimburse itself out of such gross receipts for its "operating expenses," as the term is hereinafter defined, and for the minimum license fee so paid and will allow to the Exhibitor a further sum out of such gross receipts equal to fifty per cent (50%)

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of such minimum license fee so paid; and the Exhibitor agrees to pay to Paramount, in addition to such minimum license fee a sum equal to fifty per cent (50%) of such gross receipts in excess of such split figure.

(2) For the license to exhibit each such Class B feature photoplay, the Exhibitor agrees to pay to Paramount as a minimum license fee a sum equal to thirty-five per cent (35%) of the gross receipts of the Paramount Theatre during the exhibition period thereof until said gross receipts shall reach a split figure which will allow the Exhibitor to reimburse itself out of such gross receipts for its "operating expenses," as the term is hereinafter defined, and for the minimum license fee so paid and will allow to the Exhibitor a further sum out of such gross receipts equal to fifty per cent (50%) of such minimum license fee so paid; and the Exhibitor agrees to pay to Paramount, in addition to such minimum license fee a sum equal to fifty per cent (50%) of such gross receipts in excess of such split figure.

(3) For the license to exhibit each such Class C feature photoplay, the Exhibitor agrees to pay to Paramount as license fees a sum equal to thirty per cent (30%) of the weekly gross receipts of the Paramount Theatre during the exhibition period thereof.

(4) For the license to exhibit each such Class D feature photoplay, the Exhibitor agrees to pay to

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Plaintiffs' Exhibit No. 3—(Continued)

Paramount as license fees a sum equal to twenty-five per cent (25%) of the weekly gross receipts of the Paramount Theatre during the exhibition period thereof.

(5) For the license to exhibit each such Class E feature photoplay, the Exhibitor agrees to pay to Paramount as license fees the sum of One Thousand Fifty Dollars ($1,050.00) per photoplay.

(C) The term "operating expenses," as used herein, shall be deemed to mean and shall include the usual actual cost of operating the Paramount Theatre on a straight picture policy during the exhibition period of the feature photoplay to which such term applies, expressly excluding, however, license fees for all photoplays to whomsoever payable, including but not limited to Paramount, and expressly excluding the cost of any other theatrical exhibition or form of entertainment performed by living persons on the stage or at any other part of the Paramount Theatre.

(D) If any of the aforesaid Class A, Class B, Class C or Class D feature photoplays shall be exhibited as part of a double feature program, then and in such event the Exhibitor shall pay to Paramount the license fees hereinabove specified in this Article Eight, for such feature photoplays, except that in computing such license fees there shall first be deducted from the gross receipts the license fee actually paid for the second feature on such double

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feature program, but in no event shall the amount so deducted exceed the license fee hereinabove provided in this Article Eight to be paid for the Class E feature photoplays. The cost of such second feature shall not be deemed an item of operating expense.

Ninth: (a) It is expressly understood and agreed that the designations made hereunder by Paramount in respect of each feature photoplay licensed hereunder released during the first year of the ten (10) year period hereof (except the Class A feature photoplay) to the respective price classification specified herein shall apply only to the first week's exhibition of each such photoplay. In the event any photoplay licensed hereunder shall be exhibited for a period in excess of one (1) week the license fees payable in respect of such feature photoplay for such additional period in excess of such one (1) week exhibition shall be that designated by Paramount to any of the price classifications it may so elect regardless of the price classification to which such feature photoplay may have been designated for the first week's exhibition.

(b) The license fee payable for the feature photoplays hereinabove provided for based upon a percentage of the gross receipts shall be computed separately in respect of each photoplay and separately for each week of exhibition and not cumulatively.

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Plaintiffs' Exhibit No. 3—(Continued)

Tenth: (a) The Exhibitor shall have the right to select from the short subject photoplays released during the first yearly period of the said ten (10) year period of this agreement such number of short subject photoplays released during such year as the Exhibitor may require for exhibition hereunder.

(b) Irrespective of the number of short subject photoplays which the Exhibitor may exhibit as aforesaid, the Exhibitor agrees to pay to Paramount as license fees for the license to exhibit such short subject photoplays the sum of Forty-Four Hundred and Twenty Dollars ($4420.00) during the first year of the aforesaid ten (10) year period in equal weekly installments of Eighty-five Dollars ($85.00) each payable in advance on the first business day of each and every week commencing on the first day of September, 1939.

It is understood and agreed that the aforesaid sum of Four Thousand Four Hundred and Twenty Dollars ($4,420.00) is based upon Paramount's having available for exhibition during said first year of the term of this agreement eighty-five (85) reels of short subject photoplays, and if during such yearly period Paramount shall have available for exhibition less or more than eight-five (85) reels of short subject photoplays, then and in such event the said sum of Four Thousand Four Hundred and Twenty Dollars ($4,420.00) for such year shall be proportionately decreased or increased, as the case may be, in accordance with the number of reels of short subject photoplays available for exhibition

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hereunder during each such year and the weekly instalments shall be correspondingly adjusted.

If Paramount shall release during the term hereof short subject photoplays of two reels in length, then and in such event the license fees payable for such two reel short subject photoplay shall be mutually agreed upon between the parties hereto.

(c) The Exhibitor agrees to exhibit during the first year of the ten (10) year period of this agreement each issue of Paramount Sound News during such year and to pay to Paramount as license fees for the license to exhibit each issue of the Odd Edition of such Sound News the sum of One Hundred Dollars ($100.00) per issue and for each issue of the Even Edition of such Sound News the sum of Fifty Dollars ($50.00) per issue.

Eleventh: (a) Paramount agrees to give at least fourteen (14) days' written notice to the Exhibitor of the respective dates when each respective feature photoplay and short subject photoplay shall be available for exhibition hereunder, which date shall be known as the "availability date." Within twenty-one (21) days after the mailing of such written notice of availability the Exhibitor shall give Paramount written notice of its selection or rejection of such feature photoplay and short subject photoplay and with respect to each feature photoplay and short subject photoplay rejected hereunder the license granted hereunder shall terminate and all rights herein shall revert to Para-

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Plaintiffs' Exhibit No. 3—(Continued)

mount and Paramount shall have the right to exhibit and/or license the exhibition thereof when and where desired by it. If the Exhibitor shall fail to give such written notice with respect to any such feature photoplay and/or short subject photoplay and within such twenty-one (21) day period, then and in such event such feature photoplay and/or short subject photoplay shall be deemed selected for exhibition hereunder.

(b) The Exhibitor agrees to exhibit each feature photoplay and each short subject photoplay selected as aforesaid within fourteen (14) days after the availability date of each respective photoplay as so noticed by Paramount. The date selected by the Exhibitor within said fourteen (14) day period shall be subject to the availability of prints at Paramount's Exchange then serving the Exhibitor. If no such print is available on such date then the time for the Exhibitor to exhibit such photoplay shall be within fifteen (15) days after Paramount shall have available such print.

(c) Each issue of the Sound News licensed hereunder shall be exhibited weekly in the order of general release without prior notice of availability.

Twelfth: (a) Paramount and the Exhibitor shall agree or endeavor to agree on or before August 1st of each successive year of the remaining nine (9) year period of this agreement as to the terms and conditions upon which said photoplays licensed

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Plaintiffs' Exhibit No. 3—(Continued)

hereunder for each such year commencing September 1st next ensuing shall be exhibited. Such terms and conditions to be agreed upon shall include but not be limited to classification of feature photoplays, the number of feature photoplays in each respective classification, the license fees payable for the license to exhibit feature photoplays, short subject photoplays and newsreels, clearance to be granted with respect to the theatre licensed hereunder, the minimum admission prices to be charged by the Exhibitor for admission to the Paramount Theatre during the exhibition of the photoplays licensed hereunder.

(b) It is agreed that in any event the Exhibitor shall be obligated to exhibit photoplays licensed hereunder during each year of the term hereof upon the same terms and condtions agreed to for the immediately preceding year, except, however, that if the Exhibitor shall by August 1st of any year fail or refuse to agree, if so desired by Paramount, to the same terms and condtions for the next ensuing year, commencing September 1st, as those upon which the photoplays released by Paramount shall be generally licensed by Paramount for first run exhibition in theatres located in "key cities" (as the term is used and understood in the motion picture industry) throughout the United States during such year, then in such event Paramount may at its election cancel and terminate this agreement with respect to the then remaining release years

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Plaintiffs' Exhibit No. 3—(Continued)

hereof by giving written notice to the Exhibitor of its intention so to do, such termination to be effective upon the mailing of such written notice.

(c) Notwithstanding anything to the contrary herein contained, if the Exhibitor by August 1st of any year shall fail or refuse in any event to agree to the same terms and condtions for the next ensuing year commencing September 1st as those upon which photoplays shall have been exhibited hereunder during the immediately preceding year, such failure or refusal shall be deemed a default and a material breach of this agreement by the Exhibitor, and Paramount may at its election cancel and terminate this agreement with respect to the then remaining release years hereof by giving written notice to the Exhibitor of its intention so to do, such termination to be effective upon mailing of such written notice.

Thirteen: (a) It is understood and agreed that Paramount does not warrant that it will have available for exhibition hereunder all of the feature photoplays, short subject photoplays and Paramount Sound News that are announced for release by Paramount during any year of the aforesaid ten (10) year period; and in case any feature photoplay, short subject photoplay and/or newsreel licensed for exhibition hereunder shall not be available for exhibition generally in the State of California, County of Los Angeles, the failure on the part of Paramount to deliver to the Exhibitor any

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such feature photoplay, short subject photoplay and/or newsreel for exhibition hereunder shall not be deemed a breach of this agreement on the part of Paramount nor shall the Exhibitor be entitled to any additional photoplays in substitution therefor.

(b) At any time prior to the exhibition thereof hereunder Paramount may exhibit and/or license the exhibition of not more than four (4) feature photoplays of each Group licensed hereunder as "road shows" or in any similar manner generally adopted by Paramount in the County of Los Angeles among other places; provided, however, that admission prices of at least One Dollar ($1.00) shall be charged for the majority of the orchestra seats for evening performances during such "road-show" exhibitions in said County of Los Angeles among such places. Any photoplay so road-shown shall not become available for exhibition hereunder until the completion of such road-shown exhibition and until generally released for exhibition in the County of Los Angeles.

Fourteen: (a) The term "clearance," as used herein, shall be deemed to mean the period of time which shall elapse between the conclusion of the exhibition hereunder of each respective feature photoplay by the Exhibitor and the commencement of the exhibition of such photoplay in other theatres located in the zone or zones in which the theatre of the Exhibitor covered by this agreement is located.

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Plaintiffs' Exhibit No. 3—(Continued)

(b) Subject to the provisions of Articles Eleventh and Fourteenth hereof, and subject also to the Exhibitor exhibiting the photoplays licensed hereunder as herein provided, Paramount agrees to accord to the Exhibitor in respect of the photoplays licensed hereunder for exhibition during the first year of the term hereof, the same clearance accorded by Paramount to the Exhibitor during the 1938-1939 release year, subject to such changes as may be mutually agreed upon in writing between the parties hereto from time to time.

(c) It is agreed that no clearance or specific run is granted hereunder with respect to short subject photoplays and Paramount Sound News.

Fifteenth: (a) The Exhibitor covenants and agrees that during the entire period of exhibition of each Group S-11 feature photoplay licensed hereunder, the Exhibitor will charge the follow minimum admission on prices per adult for admission to the Paramount Theatre:

25c up to 1:00 P.M.
40c from 1:00 P.M. up to 6:00 P.M.
55c from and after 6:00 P.M.

If during any release year of the term hereof the Exhibitor shall desire to charge minimum admission prices other than those agreed upon and the parties hereto shall be unable to agree upon such new minimum admission prices, such disagreement or controversy shall be settled and determined by ar-

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bitration in the manner hereinafter provided. Pending such settlement and determination by arbitration the minimum admission prices which the Exhibitor shall then be required to charge hereunder shall continue to be charged.

(b) If the Exhibitor shall charge admission prices less than the agreed minimum admission prices Paramount in addition to all other rights hereunder shall have the right:

(1) To immediately terminate the license of the motion picture then being exhibited and/or all of the remaining motion pictures not theretofore exhibited hereunder by written notice to such effect to the Exhibitor, and upon the giving of such notice the license of such motion picture or motion pictures shall forthwith terminate and revert to Paramount, and Paramount may at its option declare such failure or refusal a breach of the entire contract entitling Paramount to recover from the Exhibitor as damages therefor the license fees payable in respect of all motion pictures not theretofore exhibited hereunder, or

(2) To reduce the period of clearance which may be granted hereunder in respect of each of the motion pictures thereafter deliverable hereunder, and

(3) If the license fee of any such motion picture is to be computed either in whole or in part upon a percentage of the gross admission receipts of said theatre, then the Exhibitor shall account to

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Plaintiffs' Exhibit No. 3—(Continued)

Paramount for all admission to said theatre during the exhibition of such motion picture upon the basis of the admission prices which the Exhibitor should have charged as agreed upon.

Sixteenth: The term "gross receipts," as used in this agreement, shall be deemed to mean and shall include all sums received by the Exhibitor for admission to the theatre licensed hereunder on the date or dates of exhibition of the respective motion pictures licensed hereunder, excluding only therefrom any tax imposed by governmental authority expressly upon admissions to said theatre which is required to be collected by the Exhibitor and pursuant thereto is collected by the Exhibitor.

Seventeenth: The Exhibitor agrees to pay to Paramount, upon demand, any tax, fee, or other like charge, now and/or hereafter imposed or based upon the possession, delivery and/or the exhibition of positive prints of the photoplays licensed hereunder and/or upon any sums payable hereunder by the Exhibitor to Paramount. If, under any statute or ordinance, any such tax, fee or other like charge is and/or shall be payable or paid by Paramount and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined, then the Exhibitor agrees to pay such part of any such tax, fee or other charge, paid or payable by Paramount as shall be fair and reasonable.

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Plaintiffs' Exhibit No. 3—(Continued)

Eighteenth: (a) The Exhibitor agrees to furnish to Paramount within three (3) days after the completion of the exhibition at said Paramount Theatre of each feature photoplay licensed hereunder, (in respect of which any percentage of the gross receipts of such theatre is payable hereunder) an itemized statement of the gross receipts derived by the Exhibitor during the exhibition period of each such photoplay, an itemized statement of sums expended for the stage show presented at the theatre during such exhibition, and any and all additional information and figures necessary to compute the license fees payable hereunder for each such feature photoplay. Such statements shall be certified by an officer of the Exhibitor.

(b) The Exhibitor agrees to keep full, accurate and complete books of account vouchers and other records, showing all gross receipts of the photoplays licensed hereunder, and any and all additional information and figures necessary to compute the license fees payable therefor hereunder, and the Exhibitor agrees that Paramount shall have access at all reasonable times through its accredited representatives to the books of account, vouchers, records and documents of the Exhibitor and/or any affiliated, or subsidiary corporation and of said Paramount Theatre, in so far as they relate to the gross receipts from the exhibition hereunder of the photoplays in respect of which any percentage of the gross receipts is payable hereunder, stage show

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expenditures, operating expenses, and also to the additional information and figures hereinbefore referred to. Such representatives shall have the right to inspect, compare and make copies of any such books of account, vouchers, records and documents. During the exhibition period of any such photoplay Paramount shall have the right to have a representative stationed at said Paramount Theatre at which such photoplay shall be exhibited, who shall have access to all parts of such theatre, including the box office, and shall have the right to check and verify ticket sales, receipts and admissions. Paramount agrees that all information obtained by it pursuant to the provisions of this Article will be treated as confidential except in any arbitration proceedings and/or litigation in respect of this agreement.

Nineteenth: (a) The Exhibitor agrees to pay to Paramount the license fees payable hereunder as follows:

(1) The Exhibitor shall pay any fixed sum and/or minimum guarantee payable hereunder in respect of any feature photoplay licensed hereunder, not later than seven (7) days after the first day of exhibition hereunder of such photoplay.

(2) The Exhibitor shall pay any sum equal to any percentage of the gross receipts of said theatre payable in respect of any photoplay licensed hereunder not later than seven (7) days after the

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last day of exhibition hereunder of such photoplay at such theatre.

(b) It is agreed that the acceptance by Paramount of any sum tendered by the Exhibitor in full payment of any license fee payable hereunder or any statement furnished hereunder shall not estop or prevent Paramount from thereafter disputing the correctness of the amount of each such respective payment of statement.

Twentieth: (a) The license to exhibit each respective photoplay licensed hereunder is upon the following express conditions:

(1) The Exhibitor shall exhibit each respective photoplay without alteration or change whatsoever, except as required by any duly constituted public authority.

(2) The Exhibitor shall not remove the trademark of Paramount from any positive print of any photoplay licensed hereunder.

(3) The Exhibitor, in all advertising and exploitation of each photoplay licensed hereunder, shall advertise and announce each such photoplay as "A Paramount Picture" or as otherwise directed by Paramount, and shall otherwise adhere to the form of announcement contained in the advertising matter issued by Paramount in respect of each such photoplay.

(4) The Exhibitor shall not advertise or announce any of the photoplays licensed hereunder

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Plaintiffs' Exhibit No. 3—(Continued)

that shall be "road-shown" by means of lithographs, slides, trailers, leaders, lobby displays, booklets, circulars, window cards, newspaper announcements and/or in any other manner whatsoever, until after the completion of the "road showing" of such respective photoplay.

(b) The Exhibitor agrees to lease from Paramount, at Paramount's list rates, advertising material and accessories in respect of the photoplays licensed hereunder, of the selection and in the quantities determined by the Exhibitor from time to time, subject to Paramount's having available any such advertising material and accessories ordered by the Exhibitor. The said advertising material and accessories so leased shall not be traded, subrented, sold or given away by the Exhibitor, but shall be returned, postage or expressage prepaid, to the Paramount Exchange then serving the Exhibitor, immediately upon the completion of the exhibition of the photoplay with respect to the said advertising material or accessories which shall have been used. Provided the Exhibitor shall return in good, usable condition (as determined by Paramount) such advertising material or accessories, within five (5) days after the final playdate of each photoplay in respect of which such materials shall be used, Paramount agrees to credit to the Exhibitor's account with respect to such advertising materials and accessories, such sums for the material so returned as it credits to other exhibitors

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during each year of the term of this agreement. If such material shall be returned within the five (5) day period specified hereunder in damaged condition, unfit for use, the credit so allowed to the Exhibitor shall be in a lesser amount in accordance with the credits given in such cases to other exhibitors. It is further understood and agreed that if any such advertising material shall not be returned as herein provided, the Exhibitor will not be entitled to any credit whatsoever in respect of such advertising material.

(c) If Paramount shall distribute trailers of its photoplays the Exhibitor agrees to lease from Paramount for use only in connection with the motion pictures licensed hereunder all trailers used by the Exhibitor, upon such terms and conditions as the parties hereto may mutually agree from time to time. If the parties shall be unable to agree, such terms shall be determined by arbitration in accordance with the provisions of Article Twenty-Fifth hereof.

Twenty-First: Paramount agrees to deliver to the Exhibitor at Paramount's Exchange then serving the said theatre at which the exhibition of the photoplays licensed hereunder is licensed, a positive print of each respective photoplay in time for such exhibition hereunder. Upon the completion of the respective exhibitions hereunder of each such positive print, the Exhibitor agrees to return to such Exchange of Paramount, such positive print,

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together with the reels and containers furnished therefor. The Exhibitor agrees to pay to Paramount a sum equal to replacement cost, at Paramount's Exchange then serving the Exhibitor, for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof to the Exhibitor and the return thereof to Paramount. Such payment, however, shall not transfer to the Exhibitor title to or any interest in any such positive print, or in any photoplay, nor release the Exhibitor from any liability arising out of any breach of this agreement.

Twenty-Second: (a) In case the Exhibitor shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays licensed hereunder, by reason of censor ruling, the elements, accidents, strikes, fires, insurrection, epidemics, act of God, public enemy, public calamity, order of any court of competent jurisdiction, order or act of any duly constituted governmental authority, or for any other cause whatsoever beyond its control, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages in respect thereof are hereby waived by Paramount. Paramount may exhibit and/or license to any other exhibitor or exhibitors in the city wherein the Exhibitor has been so delayed or prevented from performing as above stated, for the same run as is granted the Exhibitor hereunder,

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the exhibition of any and all such photoplays which the Exhibitor has been prevented or delayed from exhibiting hereunder by reason of any of the aforesaid causes. The Exhibitor agrees that any such delay or failure of performance shall not affect this agreement as to all other photoplays licensed hereunder; and further agrees that promptly after the removal or abatement of the causes of such delay or prevention of performance, the Exhibitor will resume performance of this agreement with respect to any photoplay, the exhibition of which was so prevented or delayed, provided that such removal or abatement shall have been effected within sixty (60) days from the happening of any of the aforesaid causes and Paramount shall not have exhibited or licensed another exhibitor to exhibit, in the city wherein the Exhibitor has been so delayed or prevented from performance, any such photoplay as above stated.

(b) In case the Exhibitor shall be delayed in or prevented from the performance of this agreement by reason of any of the causes enumerated in sub-division (a) of this Article Twenty-Second, and such delay or prevention shall continue for a period in excess of four (4) months, when and in such event, Paramount may at its option terminate this agreement by written notice to the Exhibitor, such notice of termination to become effective at the end of ten (10) days after the receipt of such notice by the Exhibitor unless within such ten (10)

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Plaintiffs' Exhibit No. 3—(Continued)

day period, the Exhibitor shall pay to Paramount liquidated damages in respect of those unexhibited photoplays licensed and available for exhibition hereunder during the entire period when the Exhibitor was so delayed in or prevented from the performance of this agreement, the amount of such liquidated damages to be computed and determined in accordance with the provisions of Article Twenty-Eight of this agreement. If Paramount shall have licensed the exhibition of any of such photoplays to any other exhibitor or exhibitors in the city wherein the Exhibitor has been so delayed or prevented from performing, for the same run as is granted to the Exhibitor hereunder, then there shall be deducted from the amount payable by the Exhibitor under the provisions of this Article Twenty-Second (b) the sums received by Paramount as license fees for such photoplays which shall have been so licensed to any other exhibitor or exhibitors.

(c) In case Paramount shall be delayed in or prevented from the performance of this agreement with respect to any of the photoplays licensed hereunder, by reason of the elements, accidents, strikes, fire, insurrection, epidemics, act of God, the public enemy, public calamity, order of any court of competent jurisdiction, orders or acts of any duly constituted governmental authority, censorship ruling, delays of any carrier, delays in production or failure of any producer of any such photoplays to make or deliver them to Paramount, or of any star

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or other performer to appear therein in time for delivery as herein provided, or any other similar or dissimilar cause whatsoever beyond the control of Paramount, then such delay or failure of performance in respect of such photoplays shall be excused and all claims or causes of action for damages therefor are hereby waived by the Exhibitor. Such delay or failure of performance shall not affect this agreement as respects all other photoplays licensed hereunder.

Twenty-Third: (a) Paramount does not warrant that it will release in any one year of the period referred to in Article First hereof, for exhibition hereunder, any specific number of photoplays. It is agreed and understood, however, that if Paramount, during any release year of the term hereof, shall release less than twenty-six (26) feature photoplays, Paramount shall incur no liability whatsoever by reason thereof, except, however, that the Exhibitor, upon the expiration of such release year may, at its election, cancel and terminate this agreement by giving written notice to that effect to Paramount.

(b) It is agreed that Paramount may, if it so desires, cease the distribution of any and all short subject photoplays and/or Paramount Sound News at any time during the period referred to in Article First hereof without in any wise affecting this agreement as respects all other photoplays licensed hereunder.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Fourth: (a) If the Exhibitor shall file a voluntary petition in bankruptcy or be adjudicated a bankrupt or be adjudged insolvent by any State or Federal Court of competent jurisdiction, or if the Exhibitor shall file under the Bankruptcy Act a petition or answer for reorganization, or if an involuntary petition shall be filed under the Bankruptcy Act for reorganization and such petition shall be approved, or if there shall be made a general assignment of the Exhibitor's assets for the benefit of creditors, or if a Receiver (other than a Receiver in Bankruptcy) shall be appointed for substantially all of the assets of the Exhibitor and such appointment be not vacated within sixty (60) days from the date thereof, then and upon the happening of any of such events and within a reasonable time thereafter, Paramount may (in addition to any other rights and remedies that Paramount may have in such respect) cancel the license herein granted as respects any and all photoplays not theretofore exhibited hereunder, by giving written notice to the Exhibitor of its intention so to do.

(b) Subject to the provisions of sub-division (a) of this Article Twenty-Fourth, it is agreed that if either the Exhibitor or Paramount shall breach any of the provisions of this agreement or default hereunder other than the obligation on the part of the Exhibitor to pay the license fees required herein, then in such event the defaulting party shall be

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Plaintiffs' Exhibit No. 3—(Continued)

allowed a period of ten (10) days after receiving written notice of such breach or default by the non-defaulting party within which to cure such breach or default.

Twenty-Fifth: Any disagreement and/or controversy and/or any dispute that shall arise as respects the interpretation of this agreement, and/or the rights or duties of either of the parties thereto, and/or any other claim or controversy that shall arise under this agreement or the breach thereof, shall be determined by arbitration in accordance with the Rules then obtaining of the American Arbitration Association, or if said Association is not then in existence, in accordance with the laws of the State of New York governing arbitration, and judgment upon the award rendered may be entered in the highest court of the forum, State or Federal, having jurisdiction. The arbitration hereunder shall be held in New York City, unless the parties shall otherwise agree in writing. The arbitrators shall be appointed in the manner following:

Either party shall appoint an arbitrator and give written notice by registered mail of such appointment to the other party and to the American Arbitration Association. The other party, within ten (10) days after the date of receipt of such notice of appointment, shall appoint a second arbitrator and give written notice by registered mail of such appointment to the first party and within ten (10) days after such appointment, such two (2) arbitra-

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Plaintiffs' Exhibit No. 3—(Continued)

tors shall appoint a third arbitrator and the decision or award of any two of such three arbitrators shall be final and binding and conclusive upon the parties hereto. If such other party fails to appoint the arbitrator to be appointed by it, or if such arbitrators appointed by or for the respective parties shall fail to appoint such third arbitrator, then and in either such event, such then unappointed arbitrator shall be appointed by the then Arbitration Committee of the American Arbitration Association. The parties hereto agree that pending the arbitration and until the determination by arbitration of any matter referable to arbitration hereunder, neither party shall resort to any court to determine, enforce or protect the rights of either party hereunder. If any such disagreement or controversy shall involve a question in respect of license fees and/or clearance, the Exhibitor agrees to produce before such arbitrators its books of account, and records showing the gross receipts and the operating expenses of the respective theatres, for a reasonable period of time prior thereto, at which photoplays licensed hereunder shall be exhibited. All expenses and fees of such arbitration and all other necessary expenses and costs of any arbitration hereunder shall be shared and borne equally by the parties hereto. Performance of this agreement by Paramount and the Exhibitor pending such arbitration, shall not be suspended but shall be continued without prejudice to either party hereunder.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Sixth: (a) Any waiver from time to time by either party to this agreement of any breach of any terms or conditions of this agreement or any rights thereunder shall not be deemed to be a continuing waiver or a consent to any subsequent breach and shall not estop or prevent such party from thereafter enforcing similar rights subsequently arising under this agreement.

(b) This agreement is entire and complete and no representations or warranties of any kind have been made by either party hereto to the other except as in this agreement expressly set forth. It is agreed that neither party is the agent or partner of the other party and neither party shall be liable for or bound by any representation or act or by the other party.

(c) This agreement is declared to be personal with respect to the parties hereto and neither party shall assign the same or any of its rights or liabilities hereunder without the written consent of the other party first had and obtained, except that without the consent of the Exhibitor Paramount may assign or transfer this agreement or any part thereof to any parent, subsidiary or affiliated corporation of Paramount Pictures, Inc., now or hereafter formed, or may transfer or assign this agreement or any part thereof pursuant to any merger, dissolution, combination or consolidation with any other corporation. Subject to the provisions of Article Twenty-Ninth hereof, it is agreed that this

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Plaintiffs' Exhibit No. 3—(Continued)

agreement may be transferred and assigned as a whole and not in part by the Exhibitor to Fanchon & Marco, Inc., a California corporation, provided the said Fanchon & Marco, Inc., shall by written instrument, expressly assume and agree to fully, faithfully and promptly comply with and perform each and every covenant, term, and condition hereunder on the part of the Exhibitor to be performed, and that no such transfer or assignment shall be effective unless and until a counterpart original of such written instrument of transfer or assignment, duly acknowledged by or on behalf of each party executing the same has been delivered to Paramount. No such transfer or assignment shall release the Exhibitor originally named in this agreement from any liability undertaken or obligation hereunder, and it is agreed that upon such transfer or assignment Paramount may, without notice to or further consent from the Exhibitor, modify, amend or extend any term, condition, provision or undertaking of this agreement or enter into new agreements relating to the subject matter of this agreement, and whenever Paramount is required hereunder to give notice to the Exhibitor, notice to Fanchon & Marco, Inc., as transferree or assignee shall be deemed sufficient notice. It is understood and agreed that such assignment or transfer shall not be deemed to grant to Fanchon & Marco, Inc., the right to further assign this agreement or any right or interest therein.

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Plaintiffs' Exhibit No. 3—(Continued)

Twenty-Seventh: If during the term of this agreement Paramount shall distribute generally any of the photoplays licensed hereunder, produced in conjunction with television or upon third dimension film and/or wide film, then and in that event, the licenses granted to the Exhibitor hereunder shall be deemed to include such photoplays, provided however, that such licenses shall be subject to any and all limitations and restrictions imposed upon Paramount as a condition of licensing the exhibition thereof, by reason of patent rights, copyrights and any and all other rights in connection with the production and distribution of such feature photoplays with television, third dimension film and/or wide film, and the exhibition thereof in the theatres hereinbefore referred to in this agreement. Any and all terms and condtions pertaining to the exhibition of such photoplays not set forth in this agreement, shall be determined by negotiation between Paramount and the Exhibitor, from time to time, as the occasion requires, and if such negotiations shall result in a disagreement, the matter shall be determined by arbitration in the manner hereinbefore provided. The license fees and other charges to be paid by the Exhibitor to Paramount in respect of the exhibition of such photoplays shall likewise be determined by negotiation, or in the event of disagreement, by arbitration.

Twenty-Eighth: Subject to the provisions of Article Twenty-Second hereof, if the Exhibitor fails

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Plaintiffs' Exhibit No. 3—(Continued)

or refuses to exhibit any photoplay licensed hereunder, at said theatre, as provided in this agreement, then and in such event, the Exhibitor shall pay to Paramount as liquidated damages, in lieu of any other amounts payable hereunder in respect of any such photoplay, whether as license fees or otherwise, (1) an amount equal to any fixed sum, payable in respect of such exhibition of such photoplay; and/or (2) in case any percentage of the gross receipts of the theatre is payable hereunder as the license fee or any part thereof in respect of any such photoplay, then and in that event the gross receipts of such theatre for the purpose of computing such percentage shall be deemed to be the average gross recepits of such theatre during the exhibition of the feature photoplays licensed hereunder released during the same release year, exhibited at such theatre prior thereto and the liquidated damages shall be the agreed percentages of such average gross receipts; if no average gross receipts can be computed in respect of any such release year, then the average gross receipts of such theatre during the exhibition of the feature photoplay licensed hereunder released during the immediately preceding release year shall be deemed to be the gross receipts for the purpose of such computation. However, if the fixed sum referred to in subdivision (1) of this Article Twenty-Eighth shall be a minimum guaranteed sum payable on account of a percentage of the gross receipts of said

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Plaintiffs' Exhibit No. 3—(Continued)

theatre covered hereunder, then the Exhibitor shall pay to Paramount,

(a) a sum equal to the percentage of such average gross receipts which is payable hereunder if such sum payable to Paramount shall be more than such minimum guaranteed sum, or

(b) such minimum guaranteed sum if such sum payable to Paramount based upon a percentage of the gross receipts shall be less than such minimum guaranteed sum.

Twenty-Ninth: (a) It is understood and agreed that if the lease covering the Paramount Theatre located in the City of Los Angeles, California, entered into between Paramount Pictures, Inc., and Partmar Corporation, (the Exhibitor) executed and delivered simultaneously with this license and agreement, and dated August 30th, 1939, as of January 1st, 1939, shall for any reason be cancelled or terminated, or if the Exhibitor shall sell, assign or transfer or in any way part with the aforesaid lease or any interest therein, or if Paramount or its assignee shall be divested or foreclosed of the ownership or interest in the said Paramount Theater, then and in such event Paramount may at its option (in addition to any other rights and remedies which Paramount may have at law or in equity or as otherwise provided for in this agreement) cancel and terminate this agreement as respects any and

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Plaintiffs' Exhibit No. 3—(Continued)

all photoplays not theretofore exhibited hereunder upon giving written notice to such effect to the Exhibitor, such termination to be effective upon the mailing of such written notice. Nothing herein contained shall relieve the Exhibitor of its obligation to pay to Paramount the license fees with respect to the photoplays theretofore exhibited by it hereunder. It is agreed, however, that if Paramount or its assignee shall be divested or foreclosed of the ownership or interest in the said Paramount Theatre and the Exhibitor shall continue to lawfully remain in possession of said theatre and actively operate the same, then and in such event this agreeshall not be cancelled or terminated so long as the Exhibitor continues to lawfully remain in possession of said theatre and actively operates the same.

(b) It is agreed that at all times during the term of this agreement all of the issued and outstanding capital stock of the Exhibitor shall be owned and held by Fanchon & Marco, Inc., a California corporation, or that a majority of said stock of the Exhibitor shall be owned and held by the persons constituting the owners and holders of a majority of the issued and outstanding capital stock of said Fanchon & Marco, Inc., as hereinafter provided, and that a majority of said stock of said Fanchon & Marco, Inc., shall at all such times be owned and held by Marco Wolff, Fanchon Simon, H. C. Arthur, Jr., Sam Dembow, Jr., and J. H. Partington, or by any three (3) of them, and if

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Plaintiffs' Exhibit No. 3—(Continued)

at any time or times during the term of this agreement either (1) the capital stock of the Exhibitor or a majority of the capital stock of said Fanchon & Marco, Inc., shall cease to be so owned and held whether due to the voluntary act of any one or more of the aforementioned parties, or by operation of law, or (2) if less than two (2) of said persons hereinabove named shall be in actual charge of the conduct, management or operation of the Paramount Theatre, or the booking and contracting of motion pictures to be exhibited at said theatre, or (3) in the event the Exhibitor shall merge, combine or consolidate with any other firm or corporation or enter into an arrangement by which the motion picture photoplays shall be contracted for or booked for exhibition or the said theatre operated by any person, firm or corporation other than by the Exhibitor and at least two (2) of said persons hereinabove named, or (4) if the Exhibitor shall have forfeited or lost its charter and such forfeiture shall not have been rescinded or set aside or said charter not renewed within thirty (30) days thereafter, then upon the happening of any one or more of such events and at any time thereafter Paramount may at its option cancel and terminate this agreement with respect to any and all photoplays not theretofore exhibited hereunder by the Exhibitor by giving written notice to such effect to the Exhibitor and upon the mailing of such written notice this license and agreement shall be forthwith cancelled and terminated.

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Plaintiffs' Exhibit No. 3—(Continued)

Nothing herein contained shall relieve the Exhibitor of its obligation to pay to Paramount the license fees with respect to the photoplays theretofore exhibited by it hereunder.

Thirteenth: Any and all notices hereunder (except notices of availability and notices of classification which may be sent by ordinary mail) shall be served only by registered United States mail addressed, when intended for Paramount, to 1501 Broadway, New York City, New York, and when intended for the Exhibitor, to Paramount Theatre, Los Angeles, California. Any party hereto may change its mailing address from time to time by an appropriate notice to the other. To constitute due notice hereunder from one party to another, such notice must be mailed within the period of time specified in this agreement, but the time within which the recipient thereof shall be required to act thereon shall not be deemed to have begun to run until the date of the actual receipt of such notice as evidenced by the Post Office return receipt, or (if the addresses shall have refused to accept the registered notice) the date on which such registered notice shall have been first tendered to it.

Thirty-First: This agreement having been entered into and executed in the City of New York, State of New York, it is agreed that the laws to be applied to any matter arising hereunder shall be that of the State of New York.

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Plaintiffs' Exhibit No. 3—(Continued)

In Witness Whereof, Paramount Pictures, Inc., and Partmar Corporation have hereunto caused their respective corporate seals to be hereunto affixed and this agreement signed by their respective duly authorized officers, all on the day and year first above named.

PARAMOUNT
PICTURES, INC.,

By /s/ NEIL F. AGNEW,

Attest:

/s/ NORMAN COLLYER,
Asst. Secy.

PARTMAR CORPORATION,

By /s/ J. A. PARTINGTON,
Pres.

Attest:

/s/ Indistinguishable,

/s/ SAMUEL SHOYAN,
Asst. Secretary.

State of New York,
County of New York.

On this 30th day of August, 1939, before me personally came J. A. Partington, to me known, who, being duly sworn, did depose and say that he resides at 400 Park Avenue, N.Y.C.; that he is President of Partmar Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation;

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Plaintiffs' Exhibit No. 3—(Continued)

that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ SAMUEL SHAYON,
Notary Public.

State of New York,
County of New York—ss.

On this 30th day of August, 1939, before me personally came Neil F. Agnew, to me known who, being duly sworn, did depose and say that he resides at 417 Park Ave., New York, N. Y.; that he is vice-president of Paramount Pictures, Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ ARTHUR ISRAEL, JR.,
Notary Public.

Admitted November 14, 1950.

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PLAINTIFFS' EXHIBIT No. 4

Agreement dated as of September 1, 1942, between Paramount Pictures, Inc., a New York corporation, party of the first part, (hereinafter referred to as "Paramount") and Partmar Corporation, a California corporation, party of the second part, (hereinafter referred to as the "Exhibitor").

Witnesseth:

Whereas, Paramount and the Exhibitor entered into an agreement dated the 30th day of August, 1939, as of the 1st day of September, 1939, (hereinafter referred to as the "Franchise Agreement") under and pursuant to which a license was granted by Paramount to the Exhibitor to exhibit at the Paramount Theatre, Los Angeles, California, certain feature photoplays (to be selected as therein provided), short subject photoplays and each issue of two editions of Paramount Sound News, which shall be generally released for exhibition at motion picture theatres in the United States during the period of ten (10) years commencing September 1, 1939, and ending August 31, 1949, in accordance with and subject to the terms, covenants and conditions thereof, which Franchise Agreement was from time to time amended, modified and/or supplemented by instruments in writing entered into between the parties, and

Whereas, Paramount and the Exhibitor desire to extend the Franchise Agreement as aforesaid amended, modified and/or supplemented.

Now, Therefore, in consideration of the premises

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Plaintiffs' Exhibit No. 4—(Continued)

and of the mutual covenants, terms and conditions herein contained, and for other good and valuable considerations by each of the parties hereto to the other, the receipt and sufficiency of which are hereby acknowledged, it is covenanted and agreed by and between the parties, as follows:

The Franchise Agreement, as aforesaid amended, modified and/or supplemented, shall be and hereby is extended to embrace and include the feature photoplays (to be selected as therein provided), short subject photoplays and each issue of two editions of Paramount Sound News (except any and all photoplays excluded pursuant to article Second of the Franchise Agreement) which shall be generally released by Paramount, its successors or assigns, as "Paramount Pictures" or under the trademark "Paramount," or by any parent, subsidiary or affiliated company thereof now or hereafter formed to distribute or having the distribution rights of motion pictures generally released as "Paramount Pictures" under the trade-mark "Paramount," for exhibition at motion picture theatres in the United States during the period commencing September 1, 1949, and ending March 18, 1952, upon the same terms, provisions and conditions contained therein. The terms, provisions and conditions contained in said Franchise Agreement as aforesaid amended, modified and/or supplemented, shall apply with appropriate modifications in the text thereof to such extended period and photoplays embraced or included therein. The

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Plaintiffs' Exhibit No. 4—(Continued)

provisions of subdivision (a) of article Twenty-Ninth of the Franchise Agreement shall hereafter apply and remain in full force and effect with respect to the certain lease referred to therein between the parties hereto, covering the Paramount Theatre in Los Angeles, California, dated August 30, 1939, as of January 1, 1939, as amended by agreement dated as of September 1, 1942, between said parties.

Except as herein expressly provided, the Franchise Agreement as hereby extended and all aforesaid amendments, modifications and supplements thereof, shall be and remain in full force and effect.

In Witness Whereof, the parties hereto have hereunto caused their respective corporate seals to be affixed and this instrument to be signed by their respective officers thereunto duly authorized as of the day and year first above written.

PARAMOUNT PICTURES, INC.,

By /s/ NEIL F. AGNEW,
Vice-President.

Attest:

/s/ NORMAN COLLYER,
Ass't. Sec'y.

PARTMAR CORPORATION,

By /s/ MARIO WOLFF,
Vice-President.

Attest:

/s/ HARRY WALLER,
Asst. Sec'y.

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Plaintiffs' Exhibit No. 4—(Continued)

State of New York,
County of New York—ss.

On this 18th day of January, 1943, before me personally came Neil Agnew, to me known, who, being duly sworn, did depose and say that he resides at 417 Park Ave., New York, N. Y.; that he is Vice-President of Paramount Pictures Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ ANNA G. VIDICH,
Notary Public.

Commission expires March 30, 1943.

State of California,
County of Los Angeles—ss.

On this 8th day of Feb., 1943, before me personally came Marco Wolff, to me known, who, being duly sworn, did depose and say that he resides at 320 Delfern Dr., Los Angeles, Calif.; that he is Vice-President of Partmar Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of

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Plaintiffs' Exhibit No. 4—(Continued)

the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ P. P. BRUSH,
Notary Public.

My Commission expires July 12, 1945.

Admitted November 14, 1950.

PLAINTIFFS' EXHIBIT No. 7

United States District Court
Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPO-

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Plaintiffs' Exhibit No. 7—(Continued)

RATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGES, INC., and UNITED ARTISTS CORPORATION,

Defendants.

DECREE

The court having rendered its opinion herein on June 11, 1946, having duly considered the proposals of the parties and of amici curiae as to its findings and judgment, and having filed its findings of fact and conclusions of law, wherein certain of the defendants herein were found to have violated the Act of Congress approved July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act,

It Is Hereby Ordered, Adjudged and Decreed, as follows:

I.

1. The complaint is dismissed as to the defendants Screen Gems, Inc. and the corporation named as Universal Pictures Company, Inc., merged during the pendency of this case into the defendant Universal Corporation. The complaint is also dismissed as to all claims made against the remaining defendants herein based upon their acts as producers, whether as individuals or in conjunction with others.

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Plaintiffs' Exhibit No. 7—(Continued)

II.

Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration, or upon the happening of any event or in any manner or by any means.

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

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Plaintiffs' Exhibit No. 7—(Continued)

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal" covering the exhibition of features

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Plaintiffs' Exhibit No. 7—(Continued)

in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

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Plaintiffs' Exhibit No. 7—(Continued)

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method

Plaintiffs' Exhibit No. 7—(Continued)

of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run.

Plaintiffs' Exhibit No. 7—(Continued)

Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

III.

Each of the defendant exhibitors, Paramount Pictures, Inc., Loews, Incorporated, Radio-Keith-Orpheum Corporation, Keith-Albee-Orpheum Corporation, RKO Proctor Corporation, RKO Midwest Corporation, Warner Bros. Pictures, Warner Bros. Circuit Management Corporation, Twentieth Century Fox Film Corporation, and National Theatres, Inc is hereby enjoined and restrained:

(1) From performing or enforcing agreements referred to in paragaphs 5 and 6 of the foregoing section II hereof to which it may be a party.

(2) From making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the "pooled" theatres are divided among the owners according to prearranged percentages.

(3) From making or continuing to perform agreements that the parties may not acquire other theatres in a competitive area where a pool operates without first offering them for inclusion in the pool.

Plaintiffs' Exhibit No. 7—(Continued)

(4) From making or continuing leases of theatres under which it leases any of its theatres to another defendant or to an independent operating a theatre in the same competitive area in return for a share of the profits.

(5) From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent [meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question,] where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years. The relationships between the defendants and independents which violate this provision shall be terminated by a sale to, or purchase from the co-owner or co-owners, or by a sale to a party not one of the other defendants. In dissolving relationships among defendants and between defendants and independents which violate this provision, one defendant may acquire the interest of another defendant or independent if such defendant desiring to acquire such interest shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrains competition in the exhibition of feature motion pictures. Each of the defendants shall submit to

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Plaintiffs' Exhibit No. 7—(Continued)

this court within six months a statement outlining the extent to which it has complied and the manner in which it proposes to comply with this provision, setting forth in detail the names, locations, and general descriptions of the theatres, corporate securities, and beneficial interests of any kind involved, the sales thereof that it has made, and such interests as it proposes to acquire, with a statement of facts regarding each competitive situation involved in such proposed acquisition sufficient to show the probable effect of such acquisition on that situation. Similar reports shall be made quarterly thereafter until this provision shall have been fully complied with. Reasonable notice of such acquisition plans shall be served upon the Attorney General and plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the court.

(6) From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph.

(7) From operating, booking, or buying features for any of its theatres through any agent who is known by it to be also acting in such manner for any other exhibitor, independent or affiliate.

IV.

Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or

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Plaintiffs' Exhibit No. 7—(Continued)

all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

V.

The provisions of the existing consent decree are hereby declared to be of no further force or effect, except insofar as may be necessary to conclude arbitration proceedings now pending and to liquidate in an orderly manner the financial obligations of the defendants and the American Arbitration Association, incurred in the establishment of the consent decree arbitration systems. Existing awards and those made pursuant to pending proceedings shall continue to be enforceable. But this shall in no way preclude the parties or any other persons from setting up a reasonable system of arbitration either through the use of the present boards or any others as among themselves.

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defend-

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Plaintiffs' Exhibit No. 7—(Continued)

ant at its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

VII.

Paragraphs 7 and 8 of section II of this judgment shall not become effective until July 1, 1947.

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment

Plaintiffs' Exhibit No. 7—(Continued)

and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief.

IX.

The operation of this judgment is stayed for sixty days from the date hereof, and if an appeal is taken, for thirty days thereafter in order to enable any appellant to move before the Supreme Court for a stay in respect to any portion of the judgment from which an appeal has been taken.

Dated, December 31, 1946.

AUGUSTUS N. HAND,
United States Circuit Judge.

HENRY W. GODDARD,
United States District Judge.

JOHN BRIGHT,
United States District Judge.

United States of America,
Southern District of New York—ss.

I, William V. Connell, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in

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Plaintiffs' Exhibit No. 7—(Continued)

this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 23rd day of April in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the United States the One Hundred and Seventy-first.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 10

United States District Court for the Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

against

PARAMOUNT PICTURES INC., et al.,
Defendants.

CONSENT JUDGMENT AS TO THE PARAMOUNT DEFENDANTS

The plaintiff, United States of America, having

Plaintiffs' Exhibit No. 10—(Continued)

filed its Amended and Supplemental Complaint in this action on November 14, 1940; the defendants, Paramount Pictures Inc. and Paramount Film Distributing Corporation, (hereinafter sometimes referred to as the "Paramount defendants"), having filed their Answers to such Complaint, denying the substantive allegations thereof; the Court after trial having entered a decree herein, dated December 31, 1946, as modified by order entered February 11, 1947; the plaintiff and the Paramount defendants, among others, having appealed from such decree; the Supreme Court of the United States having in part affirmed and in part reversed such decree, and having remanded this cause to this Court for further proceedings in conformity with its opinion dated May 3, 1948; and this Court having, on June 25, 1948, by order made the mandate and decree of the Supreme Court the order and judgment of this court; and

The Paramount defendants, having represented to the plaintiff and to this Court that they propose, for the purpose of avoiding discrimination against other exhibitors and distributors, promoting substantial independent theatre competition for the Paramount theatres and promoting competition in the distribution and exhibition of films generally (1) to divorce their domestic exhibition business from their production and distribution business, (2) to divest Paramount Pictures Inc., and the divorced exhibition business of all interest in a minimum of 774 theatres, and (3) to subject themselves and said

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Plaintiffs' Exhibit No. 10—(Continued)

divorced distribution and exhibition businesses to injunctive provisions, all as hereinafter set forth; and that accordingly they propose to adopt prior to April 19, 1949, a plan of reorganization which will have as its purpose and effect the complete divorcement of the ownership and control of all of the theatre assets of Paramount Pictures Inc., located in the United States from all other assets of the Paramount defendants; that pursuant to such plan two new corporations will be formed, one of which (hereinafter called the New Theatre Company) will own directly or indirectly all of the said theatre assets; and the other of which (hereinafter called the New Picture Company) will own directly or indirectly all of the said other assets; and that thereafter Paramount Pictures Inc., will be dissolved; and that for the purpose of establishing separate ownership and control of the said two new corporations the stock of the New Theatre Company will be delivered to a Trustee who will hold such stock subject to the terms and conditions of this judgment, and certificates of interest representing such trusteed stock will be issued by the Trustee, and such certificates of interest together with the stock in the New Picture Company will be distributed pro rata by Paramount Pictures Inc., among its stockholders; and Paramount Pictures Inc., having set forth certain understandings with and made certain representations to the Attorney General in a letter filed herewith; and

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Plaintiffs' Exhibit No. 10—(Continued)

The Paramount defendants having consented to the entry of this judgment after the taking of evidence upon the remand of this cause by the Supreme Court to this Court but without rendition of any decision by this Court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues and matters made after said remand, and without admission by the Paramount defendants in respect to any such issue or matter, and the Court having considered the matter,

Now, Therefore, Upon Consent of the Parties Hereto, It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

The Complaint is dismissed as to all claims made against the Paramount defendants based upon their acts as producers of motion pictures, whether as individuals or in conjunction with others.

II.

A. The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined:

1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee,

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Plaintiffs' Exhibit No. 10—(Continued)

or through arbitration, or upon the happening of any event or in any manner or by any means.[1]

2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

3. From granting any clearance between theatres not in substantial competition.

4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

5. From further performing any existing franchise to which it is a party and from making any franchises in the future, except for the purpose of enabling an independent exhibitor to operate a theatre in competition with a theatre affiliated with a defendant. The term "franchise" as used herein means a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one motion pic-

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[1]In margin opposite paragraphs 1, 2, 3, 4, 6 and 7: Same as Ex. 7.

Plaintiffs' Exhibit No. 10—(Continued)

ture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.[2]

6. From making or further performing any formula deal or master agreement to which it is a party. The term "formula deal" as used herein means a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured for the theatres covered by the agreement by a specified percentage of the feature's national gross. The term "master agreement" means a licensing agreement, also known as a "blanket deal," covering the exhibition of features in a number of theatres usually comprising a circuit.

7. From performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features. To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release within ten days after there has been an opportunity afforded to the licensee to inspect the feature.

8. From licensing any feature for exhibition upon any run in any theatre in any other manner

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[2]In margin opposite paragraph 5: Modified Ex. 7.

Plaintiffs' Exhibit No. 10—(Continued)

than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

B. If a final judgment be entered in this cause against Loew's Incorporated, Twentieth Century-Fox Film Corporation, and Warner Bros. Pictures, Inc., or any of them, which shall prescribe for any of such defendants provisions for licensing the exhibition of feature motion pictures different from those required by this judgment, the Paramount defendants or the New Picture Company or either or the successor or successors of either, may file herein a written notice of election to be relieved from further compliance with such provisions of this judgment and to comply with such provisions of such judgment against said defendants or any of them, and thereupon an order or supplemental judgment shall be entered on the application of such party or parties so electing, which shall subject such party or parties to such provisions of such other judgment and entitle it or them to the benefits of any terms thereof and relieve it or them from further compliance with such provisions of this judgment.

III.

A. The defendant Paramount Pictures Inc. (hereinafter in this Section III referred to as "Paramount"), its officers, agents, servants and employees are each hereby enjoined:

Plaintiffs' Exhibit No. 10—(Continued)

1. From performing or enforcing agreements referred to in paragraphs A-5 and A-6 of the foregoing section II hereof to which it may be a party.

Filed March 4, 1949, U.S.D.C.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 11

District Court of the United States
Southern District of New York

Civil Action No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

MOTION FOR LEAVE TO INTERVENE

Partmar Corporation moves the Court for leave to intervene in this action and to file the annexed petition upon the ground that it is entitled to intervention of right upon the allegations of the attached application for intervention, upon the ground that representation of the applicant's interest by the existing parties may be inadequate and the applicant may be bound by the judgment; and upon the ground that the applicant will be adversely af-

Plaintiffs' Exhibit No. 11—(Continued)

fected by a distribution of property which is subject to the control and disposition of this Court.

JOHN HARLAN AMEN,
Attorney for Applicant.

RUSSELL HARDY,
Of Counsel.

February 23, 1949.

Notice of Motion

United States Attorney, Southern District of New York, United States Court House, New York, N. Y.

Robert L. Wright, Special Assistant to the Attorney General, Washington, D. C.

Whitney North Seymour, care Simpson, Thacher & Bartlett, 120 Broadway, New York, N. Y.

John W. Davis, 15 Broad Street, New York, N. Y.

William J. Donovan, care Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.

Monroe Goldwater, care Goldwater & Flynn, 60 East 42d Street, New York, N. Y.

Joseph M. Proskauer, 11 Broadway, New York, N. Y.

Richard E. Dwight, care Dwight, Harris, Koegel & Caskey, 100 Broadway, New York, N. Y.

Please take notice that the undersigned will bring the above motion on for hearing before this Court

Plaintiffs' Exhibit No. 11—(Continued)

at Room 506, United States Court House, Borough of Manhattan, City of New York, on March 4, 1949, at 2:30 o'clock p.m. or as soon thereafter as counsel can be heard.

....., John Harlan Amen, Attorney for Appellant.

RUSSELL HARDY, Of Counsel.

This notice, the attached motion and application for intervention served upon the above named persons by delivery of a copy on February 23, 1949.

RUSSELL HARDY.

District Court of the United States
Southern District of New York

Civil Action No. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

APPLICATION FOR INTERVENTION

1. The applicant, Partmar Corporation, is a corporation of California. It is engaged in operat-

Plaintiffs' Exhibit No. 11—(Continued)

ing a motion picture theatre in Los Angeles, California, called the Paramount Theatre.

2. The name Paramount Pictures, Inc., will be used in this application to include corporations of which it is the successor, corporations which it controls or has controlled, and corporations with which it has been in privity or may be in privity relative to the Paramount Theatre.

3. The real estate of the Paramount Theatre is owned by Paramount Pictures, Inc. Applicant has leased the theatre from Paramount Pictures, Inc., for a term which will expire on March 18, 1952.

4. By the lease and by another contract with Paramount Pictures, Inc., certain unlawful and monopolistic restraints have been and are now imposed upon applicant relative to the procurement and exhibition of motion pictures.

5. By the judgment of this Court entered in this case on December 31, 1946, and by the decision and mandate of the Supreme Court of the United States, Paramount Pictures, Inc., has been required to cease to enforce said restraints. Because Paramount Pictures, Inc., has been so required to cease to enforce said restraints, and because that prohibition will enable applicant to conduct the business at the Paramount Theatre in a lawful, unrestricted and competitive manner, Paramount Pictures, Inc., has begun, continued, and is now actively engaged in an unlawful attempt to establish,

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Plaintiffs' Exhibit No. 11—(Continued)

continue, resume and practice the same, similar and additional unlawful monopolistic restraints which have been held unlawful and condemned by this Court and by the Supreme Court in this case.

6. Between 1919 and 1923, Paramount Pictures, Inc., acquired interests in three hundred or more motion picture theatres throughout the United States. Thereafter Paramount Pictures, Inc., acquired a large number of additional theatres, including the Paramount Theatre, at Sixth and Hill Streets, Los Angeles, California. These acquisitions were made for the purpose and with the effect of restraining and monopolizing a large part of the business of exhibiting motion pictures, especially in first-run exhibition of feature pictures.

7. Continuously thereafter, until the present time, Paramount Pictures, Inc., has used the Paramount Theatre in Los Angeles as an instrumentality to effectuate the restraints and monopoly.

8. In 1927 and until 1933, Paramount Pictures, Inc., with other defendants in this case and other persons unknown to applicant, entered into so-called pooling agreements by which the Paramount Theatre and other first-run theatres at Los Angeles, normally competitive among themselves, were operated as a unit and for the common and joint benefit of the parties to the agreements. The purpose and result of the agreements was to eliminate competition in and to restrain and monopolize the distribution and exhibition of feature, newsreel and

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Plaintiffs' Exhibit No. 11—(Continued)

short subject motion pictures, first-run in Los Angeles.

9. In 1933 Paramount Pictures, Inc., went into bankruptcy, and the pooling agreements were terminated. Immediately thereafter Paramount Pictures, Inc., offered to lease the Paramount Theatre to applicant. For a long time prior thereto applicant had been desirous of engaging in the business of exhibiting first-run motion pictures at Los Angeles, but had been prevented from doing so by the conspiracy, restraints and monopolization practiced by Paramount Pictures, Inc., and the other defendants. An acceptance of the offer by applicant was, therefore, the only possibility open to applicant to engage in the business. Applicant desired and offered to lease the theatre without the unlawful conditions and restrictions hereinafter stated, but Paramount Pictures, Inc., refused to make a lease without the conditions and restrictions.

10. Applicant accordingly had the choice of leasing and operating the theatre on terms and conditions imposed by Paramount Pictures, Inc., and subject to the conspiracy, restraints and monopolization, or of being unlawfully and wholly excluded from the first-run exhibition business in Los Angeles.

11. On March 3, 1933, Paramount Pictures, Inc., and applicant entered into a lease of the Paramount Theatre to applicant. The lease was granted to

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Plaintiffs' Exhibit No. 11—(Continued)

applicant on the condition that applicant use exclusively in the theatre, feature, newsreel and short subject motion pictures, licensed from Paramount Pictures, Inc. It was a further condition that if applicant should not license Paramount pictures exclusively, the lessor should have the option to cancel and terminate the lease and to evict applicant upon three days' notice.

12. On March 2, 1933, Paramount Pictures, Inc., and applicant entered into a contract which required applicant to license exclusively from Paramount Pictures, Inc., all feature, newsreel and short subject motion pictures to be used in the Paramount Theatre during the term of the lease. The contract required applicant to charge minimum admission prices dictated by Paramount Pictures, Inc. The contract did not require Paramount Pictures, Inc., to furnish pictures exclusively to petitioner.

13. The lease provided that if the contract for pictures should not be performed by petitioner or should be cancelled or terminated by Paramount Pictures, Inc., for any reason, Paramount Pictures, Inc., should have the option to cancel and terminate the lease and to evict applicant on three days' notice. This option was reserved by Paramount Pictures, Inc., for the purpose of enforcing the requirement and condition that applicant should use exclusively in the theatre motion pictures licensed from Paramount Pictures, Inc.

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Plaintiffs' Exhibit No. 11—(Continued)

14. The requirement of the lease and contract for the exclusive use of Paramount pictures was enforced by Paramount Pictures, Inc., and thereby applicant was unlawfully restrained in the procurement of pictures for use at the Paramount Theatre, and was otherwise unlawfully restrained in its property and business. Applicant was required to pay excessive rental for the theatre, excessive license fees to Paramount Pictures, Inc., for the use of pictures; in many instances was required to accept, show and pay for inferior feature pictures; and in many instances was required to pay for short subject motion pictures which it could not and did not, in fact, use.

15. On March 1, 1934, Paramount Pictures, Inc., and applicant entered into a second lease of the Paramount Theatre to applicant, on the same condition and understanding that applicant should use exclusively in the theatre, feature, newsreel and short subject motion pictures licensed from Paramount Pictures, Inc., and on the same further condition and understanding that if applicant should not license pictures exclusively from Paramount Pictures, Inc., the lessor should have the option to cancel and terminate the lease upon three days' notice.

16. The lease also provided that if a contract of the same date between the same parties for the exclusive use of Paramount pictures should not be performed by applicant or should be cancelled or terminated by Paramount Pictures, Inc., for any

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Plaintiffs' Exhibit No. 11—(Continued)

reason, the lessor should have the option to cancel and terminate the lease upon three days' notice. The option was reserved by Paramount Pictures, Inc., for the purpose of enforcing the requirement and condition that applicant should use exclusively in the theatre motion pictures licensed by Paramount Pictures, Inc., and thereby to prevent the unrestricted and competitive operation of the theatre by applicant.

17. On March 1, 1934, the same parties entered into a contract which required applicant to license exclusively from Paramount Pictures, Inc., any and all feature, newsreel and short subject motion pictures used in the Paramount Theatre, and required applicant to charge minimum admission prices dicated by Paramount Pictures, Inc.

18. On August 7, 1934, and October 17, 1935, the same parties entered into further leases of the Paramount Theatre and on August 7, 1934, a contract granting to applicant a license to use Paramount Pictures in the theatre. The leases provided for a term to expire on August 31, 1939, subject to the same conditions stated in the prior leases, that if applicant should not use in the theatre feature, newsreel and short subject motion pictures licensed exclusively from Paramount Pictures, Inc., the lessor should have the option to cancel and terminate the lease and to evict applicant from the theatre prior to August 31, 1939, upon three days' notice.

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Plaintiffs' Exhibit No. 11—(Continued)

19. The contract granting the license for pictures was for the period ending August 31, 1939, and also required applicant to license exclusively from Paramount Pictures, Inc., all feature, newsreel and short subject motion pictures used in the theatre during that period, and also to charge minimum admission prices dictated by Paramount Pictures, Inc.

20. On August 30, 1939, the same parties entered into a further lease of the Paramount Theatre and a further contract granting a license to use Paramount Pictures in the theatre, for a period to expire on August 31, 1949.

21. Applicant requested Paramount Pictures, Inc., to lease the theatre without the requirement for exclusive use of Paramount pictures, but Paramount Pictures, Inc., refused to grant a lease without that requirement. Paramount Pictures, Inc., however, agreed to reduce the requirement for exclusive use of its pictures to one for exclusive use for forty-six weeks per year. But Paramount Pictures, Inc., required that, if, during the remaining six weeks of the year, applicant should avail itself of the privilege of using feature pictures procured elsewhere, it should pay to Paramount Pictures, Inc., $1050.00 for each week. With this exception, the lease was made upon the same condition for exclusive use of Paramount pictures, with the same option in the lessor to evict applicant for failure to comply with that condition. The lease provided that if the contract for pictures (referred to as a

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Plaintiffs' Exhibit No. 11—(Continued)

franchise), should be terminated for any reason whatsoever, the lessor should have the same option.

22. The contract, or franchise, granting the license also made the same requirement for exclusive use of Paramount pictures for forty-six weeks per year. It imposed the same requirement upon applicant to charge minimum admission prices dictated by Paramount Pictures, Inc., during the full term of the lease and contract.

2. All of the aforesaid leases provided for theatre rentals based largely upon a percentage of the gross receipts.

24. On September 1, 1942, the same parties entered into agreements extending the term of the lease and of the so-called franchise, to March 18, 1952, subject to the same conditions and requirements for exclusive use of Paramount pictures for forty-eight weeks per year, and with the same option in the lessor for eviction of petitioner.

25. In all of the leases the option was reserved for the purpose of enforcing the requirement for exclusive use of Paramount pictures, and for the purpose of preventing the unrestricted and competitive operation of the theatre by applicant.

26. At all times the condition and requirement for the exclusive use of Paramount pictures has been enforced by Paramount Pictures, Inc., and thereby applicant has been unlawfully restrained in the procurement and use of pictures at the Para-

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Plaintiffs' Exhibit No. 11—(Continued)

mount Theatre. Applicant has been required by Paramount Pictures, Inc., to pay excessive rentals for the theatre, excessive license charges and fees for the use of Paramount pictures; in many instances has been required to accept, show and pay for inferior feature pictures; and in many instances has been required to pay for short subject motion pictures which it could not and did not, in fact, use.

27. On December 31, 1946, this Court entered a judgment in this case, which provided that Paramount Pictures, Inc., was enjoined from further performing any existing franchise to which it is a party and from making any franchises in the future. The judgment defined the term "franchise" as a licensing agreement or series of licensing agreements, entered into as a part of the same transaction, in effect for more than one picture season and covering the exhibition of pictures released by one distributor during the entire period of agreement.

28. On March 26, 1947, Paramount Pictures, Inc., informed applicant that it had been enjoined from performing the picture franchise by the judgment of this Court and that the franchise was cancelled and terminated as of March 31, 1947.

29. On April 7, 1947, Paramount Pictures, Inc., atempted to exercise the option to evict applicant from the Paramount Theatre, reserved in the lease and franchise, and demanded that applicant remove

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Plaintiffs' Exhibit No. 11—(Continued)

from and vacate the theatre within three days. The demand was made because of the supposition on the part of Paramount Pictures, Inc., that the enforcement of the exclusive use requirement by Paramount Pictures, Inc., had been enjoined by the judgment of this Court.

30. Because applicant desires to conduct the business of exhibiting motion pictures at the Paramount Theatre, without the requirement for the exclusive use of Paramount pictures, and because it believes that requirement to be unlawful and unenforceable, it has refused to remove from the theatre as demanded.

31. On May 1, 1947, Paramount Pictures, Inc., by and through Paramount Pictures Theatres Corporation, filed an action in the District Court of the United States for the Southern District of California, at Los Angeles, to evict applicant from the Paramount Theatre because it is no longer able to enforce the requirement for the exclusive use of Paramount pictures by applicant at that theatre. That action is now pending.

32. That action was filed for the purpose of enabling Paramount Pictures, Inc., to evade and defeat the object of this suit to end the unlawful restraints and monopoly.

33. On May 3, 1948, the Supreme Court of the United States set aside the findings and judgment of this Court relative to franchises, and remanded

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Plaintiffs' Exhibit No. 11—(Continued)

this case for examination by this Court of the problem in the light of the elimination from the judgment of competitive bidding.

34. The case was also remanded to this Court for proceedings and action for divestiture of such of the theatre holdings of the defendants, including Paramount Pictures, Inc., as should be found to have been acquired by or pursuant to unlawful and monopolistic practices, or for the purpose or with the effect of restraining and monopolizing. The Paramount Theatre at Los Angeles was acquired, maintained and used by or pursuant to such practices, and it has been an instrumentality used by Paramount Pictures, Inc., for the purpose and with the effect of maintaining and practicing the restraint and monopoly.

35. Applicant is informed and believes that the plaintiff and Paramount Pictures, Inc., have agreed upon the terms of a final judgment to be entered in this case, without any proceedings or findings by this Court relative to the methods, purpose and effect of the acquisition, maintenance and use of theatres by the defendants, including Paramount Pictures, Inc., and including the Paramount Theatre at Los Angeles, and without requiring a divestiture of the Paramount Theatre pursuant to the mandate of the Supreme Court.

36. Applicant is entitled to intervention of right in this case upon the foregoing allegations, upon

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Plaintiffs' Exhibit No. 11—(Continued)

the fact that if the plaintiff shall agree to such a judgment, and it shall be accepted and entered by this Court, representation of the applicant's interest by the plaintiff will be inadequate and the applicant may be bound by the judgment, and upon the fact that the applicant will be adversely affected by a distribution of property which is subject to the control and disposition of this Court.

Wherefore, applicant prays:

1. That it may be permitted to intervene.

2. That Paramount Pictures, Inc., be enjoined (a) from, directly or indirectly, requiring applicant to use in the Paramount Theatre motion pictures licensed exclusively from Paramount Pictures, Inc.; (b) from instituting or continuing any suit or proceedings for the eviction of applicant from the Paramount Theatre because of the former judgment of this Court prohibiting the enforcement of franchises, or because of the inability of Paramount Pictures, Inc., to enforce the requirement for exclusive use of its pictures in that theatre.

3. That Paramount Pictures, Inc., be ordered to dismiss the suit now pending to evict applicant from the Paramount Theatre.

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Plaintiffs' Exhibit No. 11—(Continued)

4. That Paramount Pictures, Inc., be ordered and directed to divest itself of all interest and ownership, both direct and indirect, in the Paramount Theatre.

JOHN HARLAN AMEN,
Attorney for Applicant.

RUSSELL HARDY,
Of Counsel.

A true copy.

[Seal] /s/ WILLIAM V. CONNELL,
Clerk.

Admitted November 15, 1950.

PLAINTIFFS' EXHIBIT No. 12

United States District Court, Southern District of New York

Equity No. 87-273

UNITED STATES OF AMERICA,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

Before: Hon. Augustus N. Hand, C. J.;
Hon. Henry W. Goddard, D. J., and
Hon. Alfred C. Coxe, D. J.

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Plaintiffs' Exhibit No. 12—(Continued)

New York, March 3, 1949; 2:30 o'Clock P.M.

Appearances:

For the Government:

JOHN F. X. McGOHEY, ESQ.,
United States Attorney, By
ROBERT L. WRIGHT, ESQ.,
Special Assistant to the Attorney General, and
HAROLD LASSER, ESQ., and
GEORGE H. DAVIS, JR., ESQ.,
Special Attorneys.

SIMPSON, THACHER & BARTLETT, ESQS.,
Attorneys for Paramount Pictures, Inc., et al;

ALBERT C. BICKFORD, ESQ., and
GEORGE G. GALLANTZ, ESQ.,
Of Counsel. [1002*]

J. ROBERT RUBIN, ESQ., and
DAVIS, POLK, WARDWELL, SUNDERLAND & KIENDL, ESQS.,
Attorneys for Defendants Loew's Incorporated, et al.;

J. ROBERT RUBIN, ESQ.,
HOWARD GILLESPIE, ESQ., and
BENJAMIN MELNIKER, ESQ.,
Of Counsel.

*Page numbering appearing at top of page of original Certified Transcript of Record.

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Plaintiffs' Exhibit No. 12—(Continued)

ROBERT W. PERKINS, ESQ.,
Attorney for Defendants Warner Brothers Pictures, Inc., et al.;
JOSEPH M. PROSKAUER, ESQ.,
Of Counsel.

JAMES F. BYRNES, ESQ., and
DWIGHT, HARRIS, KOEGEL & CASKEY, ESQS.,
Attorneys for Defendants Twentieth Century-Fox Film Corporation, National Theatres Corporation, et al.;

JOHN F. CASKEY, ESQ.,
Of Counsel.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant Columbia Pictures Corporation;

LOUIS D. FROHLICH, ESQ.,
ARTHUR M. SCHWARTZ, ESQ.,
EVERETT A. FROHLICH, ESQ.,
IRVING MOROSS, ESQ., and
MAX M. ROSE, ESQ.,
Of Counsel.

CHARLES D. PRUTZMAN, ESQ.,
Attorney for the Universal Defendants;

C. S. LANDAU, ESQ.,
Of Counsel.

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Plaintiffs' Exhibit No. 12—(Continued)

O'BRIEN, DRISCOLL &
RAFTERY, ESQS.,
Attorneys for United Artists;

EDWARD C. RAFTERY, ESQ.,
GEORGE A. RAFTERY, ESQ., and
FREDERICK PRIDE, ESQ.,
Of Counsel. [1003]

AARON LIPPER, ESQ.,
Attorney for Harry Norman Ball;

HYMAN SCHWARTZ, ESQ.,
Of Counsel.

JOHN HARLAN AMEN, ESQ., and
RUSSELL HARDY, ESQ.,
Attorneys for Partmar Corporation.

RUBERT RUBIN, ESQ.,
Attorney for Society of Independent
Motion Picture Producers.

HERMAN S. LEVY, ESQ.,
General Counsel to Theatre Owners
America [1004]

PROCEEDINGS

Judge Hand: I think somebody had better acquaint us with this consent decree. I don't imagine we can understand it unless you do. That is not my suggestion but Judge Coxe's who has come into this proceeding late and he hopes to understand it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: If your Honor please, I think there is a motion here. That I assumed would be the first order of business. That is, the motion I would suppose would precede the presentation of the decree.

Judge Hand: All right.

Mr. Amen: May it please the Court, I should like to introduce to the Court my Washington associate Mr. Russell Hardy who is a memebr of the District of Columbia bar but not of the New York bar, and ask if you will hear him in support of this motion. He has been very busy with this situation for many years and is more familiar with its details than I am.

Mr. Hardy: If the Court please, may I suggest that perhaps the Government counsel should explain this judgment before I speak about it. Otherwise I shall have to explain it, knowing probably less about it than he knows about it, except with regard to the particular situation that I have in mind. I will do whatever you Honors wish. [1005]

Judge Hand: I assume he would be willing to.

Mr. Wright: Surely. It is a matter entirely in your Honors' convenience.

Judge Hand: All right.

Mr. Hardy: And then may I present my matter at that time?

Judge Hand: Oh, yes.

Mr. Wright: I have here a signed copy of the decree, signed by counsel, which is the one we should

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Plaintiffs' Exhibit No. 12—(Continued)

like to have the Court execute. I understand that each of your Honors was given a copy at the time that the notice was served.

Judge Hand: Yes, I have mine.

Mr. Wright: You each have it.

Judge Hand: I presume in doing this, Mr. Wright, you very likely may want to anticipate the argument to intervene.

Mr. Wright: Well, I hadn't. I hadn't anticipated dealing with the argument to intervene. All I was going to do was to give the factual explanation of what was in the decree.

Judge Hand: I thought you might probably refer to the other when you came to it. Then we will give you all the time you want on each side to talk about it.

Mr. Wright: Well, this decree is a decree [1006] which provides for the divorcement of the Paramount domestic theatre business from the other business of the Paramount Company by the process of a preliminary reorganization subject to stockholder approval, as in the case of the RKO decree, which will result in the formation of a new theatre company to hold the domestic theatre assets, and a new picture company to hold the other assets.

Judge Hand: Have they started their reorganization proceeding in RKO?

Mr. Wright: The RKO stockholders' meeting I believe is now set for March 28th. I understand that proxy statements will go out today to Para-

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Plaintiffs' Exhibit No. 12—(Continued)

mount stockholders with a meeting, or announcing a meeting for some time in the first week of April at which this decree will be presented to the Paramount stockholders. In either case, the decree is not final until approved by the stockholders.

The reorganization in the RKO case, you will recall that the control of the company is in the hands of a single large shareholder, Mr. Howard Hughes, and divorcement in the RKO decree was provided for by requiring that Mr. Hughes either sell or trustee his controlling interest in one of the two new companies after the completion of the organization [1007]

Judge Hand: We saw some papers that he was doing that.

Mr. Wright: Yes. Well, he is required——

Judge Hand: I know he is required.

Mr. Wright: ——under the decree to do it.

Judge Hand: It was in the papers that he was in the course of making some kind of arrangement.

Mr. Wright: Yes. [1008]

Mr. Wright: The Paramount decree presented a somewhat different problem, since we are dealing with a corporation whose stock is very widely held and no single shareholder, I believe, owns as much as one or two per cent.

In this case the technique of assuring separation of the two new companies involves the employment of a trustee similar to the trustees that were used at the time the Reading and Lehigh Valley cases were

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Plaintiffs' Exhibit No. 12—(Continued)

decided, when certain of the coal-carrying railroads were separated from the Pennsylvania Anthracite Coal Mines. That, in substance, provides that the stock of the new theatre company goes to a trustee and the shareholders receive certificates of beneficial interest.

The stock is voted by the trustee. The certificates of beneficial interest become convertible into stock as the owners file an affidavit to the effect that he then has no stock in the picture company.

By that process it is hoped to assure substantially separate ownership of the two companies.

Of course, in so far as control is concerned, there are provisions for separation of management similar to those contained in the RKO decree, and requirements that the boards have a majority of independent directors. [1009]

The trusteeship is, in any event, under this decree, to terminate within a five-year period and at the time of termination the Court will—rather elaborate provisions are contained for keeping continuous track of the beneficial ownership in both the new picture company and new theatre company—at the time of termination, the Court will then examine the ownership to be sure that there is no common or interlocking control at the time of termination. In essence, that is the divorcement plan.

Judge Hand: What does the small stockholder, for instance, get in Paramount?

Mr. Wright: The reorganization plan, I believe,

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Plaintiffs' Exhibit No. 12—(Continued)

contemplates that in return for each share of stock of the parent company, which will be dissolved, he will receive a share in each of the new companies and, as I say, his share in the theatre company will be evidenced by a certificate of interest, the share itself being deposited with the voting trustee.

Judge Hand: Yes.

Mr. Wright: And there are dividend withholding provisions also calculated to accelerate the separation of the ownership of the companies.

Both the new companies will be subject to all of the provisions of your Honors' existing 1946 judgment, [1010] which was affirmed by the Supreme Court. And in the case of the new picture company it would also be subject to an additional provision, which is paragraph 8 of section 2 of this decree, prohibiting discrimination in the licensing of films, requiring that each film be sold picture by picture, and theatre by theatre, upon the basis of competitive merits of the particular theatres, exhibitors and pictures involved. I think you will find that provision is largely in language that was used in your Honors' original 1946 judgment.

Judge Hand: You mean it is more or less of an auction system?

Mr. Wright: No, it doesn't require competitive bidding at all, but it does assure the right of any exhibitor to compete for Paramount films, if he desires to do so, on the basis of the particular operation that he has, the merits of his theatre and himself as an operator.

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Plaintiffs' Exhibit No. 12—(Continued)

Judge Hand: How is he going to get notice?

Mr. Wright: You mean notice of the entry of this decree?

Judge Hand: No, notice of how to bid.

Judge Goddard: How is he going to know about the picture, to bid?

Mr. Wright: I suppose the obligation is [1011] on Paramount to negotiate with whoever desires to negotiate for the run of the film. There are no formal requirements as to how the obligation shall be carried out. I should suppose, of course, that those who wish to compete for a particular run in a particular theatre will let Paramount know about it. I don't think there is any question of notice involved other than the exhibitor's knowing that he has the right under the decree to compete on the basis of the merits of his operation. That is about all that this provision does, is assure him of that right, if he chooses to exercise it. There may or may not be competitive negotiations in a particular instance. It depends, I suppose, wholly on the position that the exhibitors take in the particular situation.

With the exception of that provision, section 2 of the decree which contains the injunction regulating the conduct of the picture business, is exactly the same as that decreed in the 1946 judgment and affirmed by the Supreme Court.

The provisions which deal with the theatre circuit are divided into three sections, the first of which

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Plaintiffs' Exhibit No. 12—(Continued)

deals with the jointly owned theatres. The Paramount circuit is mainly composed of those joint ownerships, and those jointly owned theatres are all [1012] listed here, and Paarmount is given three years in which to complete the dissolution of all of the joint ownerships by which theatres are held between them and independent exhibitors, one-third within one year, two-thirds within two years, or within three years.

Judge Hand: That was the main object of their appeal, wasn't it, their separate appeal? That was one of the main objects, to get rid of that?

Mr. Wright: Yes. I think all of the major defendants objected on their appeals to that.

Judge Hand: I am talking about Paramount. Some of them did not seem to object at all.

Mr. Wright: I think all of the five defendants assigned errors to these provisions of your decree which required a dissolution of the joint ownership.

Judge Hand: Yes, of course, people assign error to everything they can think of. They certainly didn't argue it in the Supreme Court, some of them.

Mr. Wright: That is true.

Judge Hand: And Paramount was the mainly aggrieved party because they were really the mainly affected party.

Mr. Wright: Paramount had the most at stake.

Judge Hand: Yes, that is what I mean.

Mr. Wright: In those provisions. That is quite correct. [1013]

This decree, as I say, accomplishes the dissolu-

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Plaintiffs' Exhibit No. 12—(Continued)

tion of those joint ownerships over this period of time, giving to Paramount a large measure of flexibility in the manner in which the dissolution is to be accomplished. They may either sell out entirely to the partner or they may split assets in accordance with a competitive pattern spelled out in section 3(b) of this judgment. That is the purpose of those limitations, you see, in 3(b), specifying the theatres and towns in which they might convert from the present partial to full ownership, is to see that in no event would Paramount be left in a position where it could dominate film exhibition in those particular communities. The purpose of those provisions is to see that there is no split of assets based on a territorial division between the partner and Paramount, or a split which would, in effect preserve monopoly values.

They are also given the option, in the event that a split or sale to the partner cannot be worked out, to purchase from the partner and resell all of those theatres to independents except such as they are permitted to acquire and retain here to establish this competitive pattern.

Judge Goddard: Mr. Wright, generally speaking, [1014] the present Paramount Corporation will be done away with, and any interest in any theatre would be conveyed to a theatre-owning corporation?

Mr. Wright: That is correct, your Honor. The present Paramount Company will be dissolved in accordance with the reorganization and the entire

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Plaintiffs' Exhibit No. 12—(Continued)

assets split between the two new companies, which means theatres going to the new company and other assets going to the new picture company.

Judge Goddard: Any and all interest in any theatre will be conveyed to the theatre-owning corporation?

Mr. Wright: Yes, with one exception. The Paramount Building here in New York may be retained for a period of, I believe, five years by the picture company but solely as an asset. That is, it will not be operated by them.

Judge Goddard: Well, where will it end up?

Mr. Wright: It will end up in the hands of someone other than Paramount, but that is the only exception to the complete divorcement, and that of course, will ultimately be divorced, but there is a five-year period during which that may be retained.

The other provisions which affect the theatre company, in addition to this dissolution—oh, during the period these joint ownerships are dissolved, the new [1015] theatre company is prohibited from expanding its operations, that is, it may during that period only replace or acquire the theatres that are specified in the decree in the course of these dissolutions of the joint holdings. After that time the new theatre company is subject to the same provision as we have in the RKO decree. There is no acquisition of an additional theatre—of course, replacements are taken care of automatically—without prior court approval.

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Plaintiffs' Exhibit No. 12—(Continued)

The section of the decree dealing with the theatre company also requires the divestiture of theatres which are wholly owned in situations where that divestiture is necessary to open the competition currently closed, first-run situations, and there are about 70 theatres involved in that section, most of which are, I should say, in towns of 25,000 or more, and most of which are first-run theatres, the purpose being to open up first-run competition in those situations where it does exist.

The net effect of all these provisions taken together, I think, is to establish a picture company which will be dependent upon the merit of its product for its success or failure, and to establish a new theatre circuit which will also be in a position where it will have to succeed in a competitive basis and will [1016] not be in a position to monopolize film exhibition in any of the cities where it operates.

Now, if there are any more questions on the decree itself, I will deal with these. Otherwise, I was going——

Judge Hand: What is done with the exercise of leases to the other defendants?

Mr. Wright: Is your Honor referring to theatre leases?

Judge Hand: Yes.

Mr. Wright: So far as I know, there are no——

Judge Hand: And leases also of pictures.

Mr. Wright: There are in this decree no prohibitions against cross-licensing. The decree provides that within one year the picture company and

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Plaintiffs' Exhibit No. 12—(Continued)

the theatre company will be operated separately and under those conditions, we felt it was unnecessary to provide for interim cross-licensing relief, which we think would be necessary if you were going to have a longer period required for separation for freeing the picture company's pictures from control by the theatre company's pictures.

Judge Goddard: There is nothing about arbitration?

Mr. Wright: That is right, your Honor. We have not attempted to deal with arbitration at all. Here [1017] as we see it, the arbitration problem is necessarily a subsidiary one. It is at best merely an enforcement technique that can only be applied after the substantive provisions that are going to affect all these defendants have been determined.

Judge Goddard: That is reserved for further consideration?

Mr. Wright: Oh, yes. Ultimately, I think, there will be some sort of voluntary arbitration that should implement whatever final judgments are entered against all these people.

Judge Coxe: There is some provision that I have seen, I can't find it now, with respect to what is going to happen in the event this case continues in so far as the other defendants are concerned and there is a decision of some kind favorable, or something to change the result accomplished by this, that the Paramount Company could have the benefit of it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: Yes, that escape clause you are referring to?

Judge Coxe: Yes.

Mr. Wright: That is in section——

Judge Coxe: I don't know whether there are one or two.

Mr. Wright: Section 2 of the judgment provides that [1018] if the remaining major defendants, that is, Fox, Warner and Loew secure a more favorable decree with respect to the film licensing provisions, that Paramount may have the benefit of such provisions.

Judge Coxe: But does that only affect what you have spoken of as licensing?

Mr. Wright: Yes.

Judge Coxe: I thought it was broader than that.

Mr. Wright: I think, in terms, you will find——

Judge Coxe: What section was it, 2?

Mr. Wright: I believe that is at the end of section 2. Page 5, paragraph B.

Judge Coxe: That seems to be confined only to provisions for licensing the exhibition of feature motion pictures.

Mr. Wright: The entire decree operates upon features.

Judge Coxe: I see.

Judge Hand: Well, I don't really understand that, but probably that is because I forget most of what is in our decree and everywhere else. I cannot carry those things in mind along with so much other litigation.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: There is no reason why you [1019] should.

Judge Hand: What does it really mean? I mean, give me an illustration.

Mr. Wright: Well, I should suppose this paragraph 8, that you see immediately above B, is kind of an anti-discrimination provision that we will seek in the final judgment against the remaining defendants in the case, and this provides that if we don't get it, or get a less favorable discrimination provision against Loew, Fox or Warner, that Paramount may have the benefit of that provision.

Judge Hand: Is there anything in that decree or in the Supreme Court's opinion which deals with this particular thing?

Mr. Wright: Yes, the Supreme Court said that, in view of the vacation by it of the competitive bidding system, it would be necessary in any event to have an anti-discrimination provision, and this paragraph 8 has been inserted in response to that express direction. That is the direction which, as we read it, applies to the decrees to be entered against all eight, all of the distributor defendants as such and, as I say, this is the provision which we shall seek against the remaining six distributor defendants. The escape is limited to whatever is entered against the other [1020] three remaining major defendants.

Judge Coxe: But in so far as the dissolution or the divorcement is concerned in the Paramount case, it is not contemplated that at some time, no matter what there may be in a final decree with respect to

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Plaintiffs' Exhibit No. 12—(Continued)

the other defendants, the Paramount Company then might have a right to go back to where they are today.

Mr. Wright: No, there is no escape from the divorcement provision. I might point out that, like the RKO decree, there is——

Judge Coxe: Or go back where I was with them at the time of reorganization, which was a good reorganization and a magnificent job. I thought I would like to throw that bouquet at that reorganization. [1021]

Mr. Wright: I assume that it was. This does contemplate another reorganization, though, which will supersede that one permanently.

Judge Coxe: That goes for the lawyers' fees too.

Mr. Wright: I don't think there is any question but what the reorganization here contemplated is intended permanently to supersede the bankruptcy reorganization. I think if your Honors had in mind some defensive reintegration—of course, it is true that neither this decree nor the RKO decree prevents a new picture company from acquiring theatres, by anything that is in the decree. That would be whatever position they are under general law with respect to any activity of that kind.

Judge Coxe: You are making them get rid of the Paramount Theatre uptown.

Mr. Wright: This does permanently separate——

Judge Coxe: The one Mr. Thas spoke about. You perhaps don't recall that.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: I am sorry, I don't, your Honor.

Judge Coxe: I shouldn't have mentioned it.

Mr. Wright: I would like to hear more. This does permanently separate the existing Paramount Theatre Circuit from the Paramount Picture Company.

Judge Coxe: I understand. [1022]

Judge Hand: Well, what about the intervention?

Mr. Wright: Well, our position, of course, on this intervention is precisely what it was in the Supreme Court in this case and what it was before Judge Goddard three years ago when similar attempts were made. I don't think there is any question but what these people who seek to intervene don't have standing to do so. In so far as being heard, of course, we have no objection to anyone who wishes to draw attention to any of the asserted defects in this decree telling your Honors what they think they are.

We don't, however, concede the right of anyone to come in as a party and litigate the question of what should or should not be done in this situation.

Judge Coxe: Well, what is the practical effect of intervention such as this in this case other than the fact that the papers have to be served on the attorneys?

Mr. Wright: The practical effect of intervention if you permitted them to come in as parties, I suppose would be to make impossible the settlement of any of these controversies by consent. You would

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Plaintiffs' Exhibit No. 12—(Continued)

I suppose have the interminable litigation that we are seeking to avoid by these consent decrees.

I suppose the position of these people is [1023] that if we pursued as they say we ought to pursue all of the possible avenues of relief which the Supreme Court has offered us, that we might at some future date wind up with a good deal more drastic relief than we have here—the divestiture of many more theatres. But the assumption on which we make this consent judgment of this kind, and, of course we think a proper one, is that the relief now obtainable, the general benefit to the industry as a whole, justifies us in foregoing the pressing of every ultimate avenue of relief that is open to us.

Judge Hand: What do these people really want as you understand it?

Mr. Wright: Well, as I understand it, they say in effect that we should have required Paramount to divest itself of certain theatres which are not required to be divested. And that is, I suppose, a question of judgment, one, as to whether or not the facts on which they rely could be established and, two, if they were established, whether such relief would automatically follow and, three, even so, whether the additional litigation that would be required to get that relief would justify the time and effort required to do it, and foregoing the relief that is now available. That is a question of judgment—— [1024]

Judge Hand: Is it any different in substance

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Plaintiffs' Exhibit No. 12—(Continued)

from all the denials? All the independents that were denied the right to intervene during this litigation?

Mr. Wright: I don't think it is, your Honor, no.

Judge Hand: I don't see that it is, but, of course, we have to hear what they have to say and make up our minds after that.

Mr. Wright: That we have no objection to your hearing anyone who wishes to express himself as to the merits or demerits of any part of this judgment.

Judge Coxe: I am afraid I don't understand exactly what your answer was to my question.

Mr. Wright: I beg your pardon.

Judge Coxe: Namely, what particular advantage do you conceive that they would get by being allowed to intervene.

Mr. Wright: Well, the advantage that they would get I suppose is that they don't have—they are not interested as we are——

Judge Coxe: Assuming that they can be heard at any time, certainly this afternoon.

Mr. Wright: Yes. Well, I suppose that if they could actually become parties they would prevent us from terminating the litigation as to Paramount by consent [1025] and would compel us to pursue the avenues of relief which they say are open up to the point where a theatre which they are interested in would be divested and they would have a chance to buy it. I suppose that is what is at stake.

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Plaintiffs' Exhibit No. 12—(Continued)

Judge Coxe: You think there is a chance they would be able to do that?

Mr. Wright: It certainly is conceivable, if we prolong this litigation long enough some of those other things might happen. I can't say.

Judge Coxe: We might not any of us be here.

Judge Hand: Or even our successors.

Judge Goddard: At one point you said the intervener wanted time to dispose of more theatres and I understood you to say that Paramount was to dispose of any and all theatres——

Mr. Wright: Well, I think the difference is in the meaning of disposition. Of course, the divorcement does not actually deprive Paramount of any asset it has now; none whatsoever. What he is talking about when he says "divestiture" is the actual sale of a theatre asset to an outsider, to an independent exhibitor, such as we have provided in the case of some of these theatres that are in here where it is necessary to open up competition in towns in which the new theatre company [1026] might otherwise dominate.

Judge Goddard: All right.

Judge Hand: Well, we will hear from the attorney for the intervener.

Mr. Bickford: Judge Hand, might I be heard a moment on the Paramount situation?

Judge Hand: All right.

Mr. Bickford: There isn't much that I can add to what Mr. Wright has said in his very fair statement of what this decree provides.

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Plaintiffs' Exhibit No. 12—(Continued)

However, I did want to call your Honor's attention particularly to section 9 of the decree appearing at page 66, which has three very important provisions. One is that this decree will entirely supersede the decree which this Court entered on December 31, 1946, which was affirmed in part and reversed in part by the Supreme Court.

The second is that this judgment which we are asking you to enter now will have no force and effect unless it is approved by the Paramount stockholders at the meeting called especially for that purpose, and the decree provides in that section that if stockholder approval is not obtained by April 19, 1949, then the case is to be restored to the docket, the judgment is no longer in effect, and there will be a trial of the [1027] issues.

I might tell you that the stockholders' meeting is called for April 12th. The notices will go out on March 7th with a full and complete description of the decree and the plan of reorganization, which the stockholders will be asked to approve, and I wanted to call that to your Honor's attention because there is a possibility that this stockholder approval may not be obtained, and then this decree which we are asking you to enter will not be in force.

Now the other provision of section 9 which I think is of importance and particularly to your Honors is that both sides waive the convening of the statutory court and consent that any further orders in this case may be heard in the regular

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Plaintiffs' Exhibit No. 12—(Continued)

motion part by any judge of this district. So that this court so far as the function of this decree is concerned will be functus officio after stockholder approval.

Judge Hand: What about the RKO decree in that respect?

Mr. Bickford: That I believe has the same provision.

Mr. Wright: That is right, your Honor.

Mr. Bickford: Now with respect to the motion for intervention, I don't want to anticipate [1028] entirely Mr. Hardy's argument but I have an affidavit which I would like to submit to the Court and give a copy to Mr. Hardy in opposition to that motion. We oppose it, as, of course, Mr. Wright has opposed it, and want to point out that if the intervention is granted then this consent decree cannot go into effect, and that the proposed interveners will have the right to appeal and take the case back to the Supreme Court and there may be a long trial of the issues in the event that they seek to present evidence here, as to the alleged wrongful acquisition by Paramount or maintenance by Paramount of a single theatre in Los Angeles which has been leased to the proposed interveners by Paramount since 1933.

Now there is a suit pending in California involving that theatre, a suit between Paramount and these proposed interveners. That case is at issue and is being vigorously prosecuted. It was pointed out to your Honors in the argument in this case

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before that case was pending, and I think all the issues can be disposed of there, and they should be disposed of there, and not to interrupt the orderly process in this court by permitting the intervention.

I would like to reserve a moment or two after Mr. Hardy has spoken, if there is anything that he says [1029] that I think should be answered. But this decree or judgment which we are now asking your Honors to sign is the product of a great deal of work and a great deal of thought on behalf of the Government and the Paramount officials and attorneys. We believe that it is a good decree from the standpoint of both sides to end the litigation between these parties, and we ask your Honors to sign it.

Mr. Lipper: May I respectfully move the admission of Hyman Schwartz of the Pennsylvania Bar who would like to be heard on several provisions that affect Pennsylvania interests.

Mr. Louis Frohlich: Your Honor, may I be heard before any intervener? I am a party here, and I have two objections to the decree that I wanted to mention. I wanted to point out two things to the Court. One is that this decree prevents any defendant from ever purchasing a theatre owned by Paramount.

Now Mr. Raftery is going to argue on that. I am with him. Columbia-United Artists want to be free in the future if they have to purchase theatres. In order to live they want to be able to purchase

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Plaintiffs' Exhibit No. 12—(Continued)

any theatre in the country. They own no theatres now. There is no danger of any monopoly, but at least this decree prevents that process, but particularly I want [3020] to call the Court's attention to paragraph 8 on page 3, that provision which Judge Hand pointed out and Mr. Wright looked at about the compulsory competitive bidding, coming in through the back door. Well, I think it is. It does two things which violate the Supreme Court decision. It brings back compulsory bidding—compulsory competitive bidding, and it destroys the right of any defendant to sell pictures in a group, not to block book upon condition, which this Court has condemned and which the Supreme Court has sustained the condemnation of, but this Court was always careful to say that Columbia or any other defendant could sell a group of pictures providing it didn't condition and make the exhibitor buy one or more pictures as a condition for getting the group. That is not block booking within the meaning of this decision. And the Supreme Court was careful to point that out, too.

Now here we come to section 8 which says in effect that that may not be done. It says all you can do is take each picture and offer it to each theatre. That goes far beyond block booking which is condemned. It prevents anybody, any exhibitor from purchasing from Paramount more than one picture. The exhibitor may say "I want to purchase six of your pictures." It cannot do it under

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this decree. The exhibitor may have three or four theatres and say, "I want to purchase one [1031] Paramount picture for each theatre as a group." It cannot be done. What the Government has done here is that it has broadened this Court's decision on block booking and has taken away the additional feature which made it illegal, and now completely prevents the sale of pictures in groups. That violates not only this Court's decision but the United States Supreme Court's decision. So that it has brought in once more compulsory bidding which the Court rejected, and it has broadened the scope of the block booking so as to make any kind of sale of a group illegal. I think that before this Court comes to consider the signing of the decree it should consider seriously the deletion of paragraph 8.

Judge Hand: Is Mr. Raftery here?

Mr. Frohlich: Yes, Mr. Raftery is here and will address the Court with your Honors' permission.

Mr. Bickford: May I answer that particular thing, your Honor?

Judge Hand: Well, let us see what Mr. Raftery has to say.

Mr. Raftery: May it please the Court, that Section 8 is not in the RKO consent decree that Mr. Frohlich is talking about. They stopped destroying RKO after 7, but with Paramount they threw another hook at them and put 8 in there. [1032]

Now our objection to the decree, and Universal feels the same way about it, and so does Columbia,

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is that Mr. Wright is procuring by indirection an injunction against the Little Three negotiating or trying to buy any one of these Paramount theatres. Now it may be after this complete wreck is accomplished and these theatres are on the market, that in self-preservation we might decide in a competitive situation that we would want to buy a theatre.

Now in your Honors' original judgment and in the relief the Government is seeking against us, they are only seeking to enjoin particular practices that they claim are illegal in distribution, but by enjoining the Paramount from talking to us on these theatres they have eliminated the Little Three as potential customers.

Any other circuit in the country with 50 or 60 or 70 or a hundred theatres can bid for these Paramount theatres, but United Artists, Columbia and Universal are left out.

Now the entire thing can be cured by the insertion of one word, and I think that is what the Government had in mind.

If your Honors will turn to paragraph A on page 38. I think that is the first time that occurs. It is the sixth line in that paragraph. They restrict [1033] the right to transfer these various interests to a third person who is not a defendant herein. Now I am sure that what they had in mind originally following your Honor's original decision and Mr. Justice Douglas' decision, was that that should have read, "who is not an exhibitor defendant herein." If you remember, your Honors in paragraph 2 of the origi-

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nal decree granted relief against the major defendants. Then in the next paragraph, 3, when you came to talk about the others, you left the Little Three out and your provisions were against exhibitor defendants.

Now if they would insert the word "exhibitor" before the word "defendants" in about a half dozen places that I have cited in this short memorandum, I would have nothing more to say about this decree because I look upon it as a private contract between the Government and Paramount.

As I understand it, the Attorney General is supposed to be representing the people in this proceeding. After hearing Mr. Wright I have my doubts about the latter, but nevertheless I would like to submit this proposed memorandum on the proposed changes merely to insert the word "exhibitor" and let the Little Three go back to right field where they have been since this case began. [1034]

Mr. Frohlich: And may I submit my memorandum to your Honors?

Mr. Landau: Your Honors, I speak for Universal. I join with Mr. Raftery in what he has said and I would also like to point out that up to this very time it has been the position of counsel for the Government on a number of occasions in discussing this general question, that not only did counsel not object to any of the Little Three acquiring theatres from time to time, but they would welcome it on the theory that the acquisition of any such theatres would promote competition between any one of the Little Three and the individual major

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Plaintiffs' Exhibit No. 12—(Continued)

defendants. Now that was the position of counsel for the Government from as early as 1946 up to the present time.

The Court: What do you say to that, Mr. Wright?

Mr. Wright: If your Honor please, this suggestion comes as a complete surprise to me because the very same limitation that is in this decree was in the RKO decree which was presented last November, and none of these people ever suggested to me prior to today when I was served with this notice in the hall as I came in here that this provision was one which they felt affected them in any substantial way.

Now the purpose of the provision is very [1035] plain. The language is in there not by inadvertence at all but by design. The theory on which these theatres are to be divested is that they were used as a part of a conspiracy to which these gentlemen's clients were parties. They are co-conspirators with those who are being divested of the theatres. There would in our view be no merit whatsoever in having any of these defendants transfer these theatres from one to another. It would be utterly inconsistent with the fundamental theory of the lawsuit, and I should suppose that they have no more vested right to be considered as potential purchasers of Paramount theatres than anyone else in the country.

I don't see any basis whatsoever for their asserting a special claim to a right to purchase a Paramount theatre.

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Plaintiffs' Exhibit No. 12—(Continued)

Insofar as the purchase of theatres is the general issue, so far as their activities are concerned this decree, of course, says nothing whatsoever. It only controls the disposition by Paramount of its property.

Mr. Raftery: Of course, your Honors, with RKO, Mr. Wright got that by us. We didn't discover it. If we had discovered it last November we would have been in with the same plea. We discovered it this week when we got this Paramount decree, and when we see something [1036] as far-reaching as this, where what Judge Coxe created in the reorganization is striken down and thrown to the winds, we want to know about it. We may have to get into the theatre business.

Judge Hand: Don't depress him any more. He may want to intervene.

Mr. Raftery: We are not intervening.

Judge Hand: I say Judge Coxe will want to intervene.

Judge Coxe: That is the last thing I would want to do as far as I am concerned.

Mr. Raftery: The proposition we are interested in is that this issue has not been tried. Here is something by indirection getting into a decree against the Little Three, and we say we have a perfect right at law in respect to that. Mr. Wright in his answer I think to one of your Honors' questions said that the new Paramount Picture Company is under no restraint to go out and acquire

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Plaintiffs' Exhibit No. 12—(Continued)

theatres in the future provided it does it according to existing law.

Judge Hand: What is this section you are referring to now?

Mr. Raftery: Section A on page 38. Where it says, "with the right to sell to third persons not a defendant in this action." [1037]

Judge Hand: I hardly see how it could do any harm to anybody to let you three people get into this. They say they did this very deliberately, though, and you have no right in this respect.

Mr. Raftery: Well, we have a right in this action. For instance, suppose in a consent decree Paramount comes along and agrees with the Government that subdivision (a), for example, shall be applicable to United Artists. Now that is exactly what is done here. They have by consenting to a decree against themselves consented to one which in effect is a decree against United Artists, against Columbia and against Universal.

Judge Hand: I don't see particularly how there can be advantage to the Government with this provision.

Mr. Raftery: I don't.

Judge Hand: But I don't see how you have any standing to object.

Mr. Raftery: But it happens to operate directly against three defendants who are parties to this action.

Judge Hand: Suppose they said they couldn't sell to any particular class of persons: Could that

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Plaintiffs' Exhibit No. 12—(Continued)

class come in here and object to such a provision? They couldn't if they were not parties. I don't see how [1038] they can merely because they are.

Mr. Raftery: Well, that may be true but I don't follow it. I think in any consent decree they can consent to anything that affects their own rights but I don't see how they can consent to something that affects us.

The Paramount Theatre Company will have six or seven hundred theatres. We can't bid for any theatres that are in the open market with anybody else. I think that is a complete deprivation of our rights by indirection and I think on that we have a perfect right to be heard and I don't think the Attorney General has a right to deprive us of our rights by consent.

Now I say he is not representing the interests of the people whom he is supposed to represent when he comes in here and just takes three companies and by indirection deprives us of a very substantial right. On that point I think Mr. Wright overstepped. When I say Mr. Wright, I mean those in charge of consent decrees.

Judge Hand: You don't own any theatres?

Mr. Raftery: No.

Judge Hand: He doesn't want them, I suppose, to be in a position of being in the picture and not the other——

Mr. Raftery: Well, I don't think the Attorney General in his wildest claims has ever claimed that

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Plaintiffs' Exhibit No. 12—(Continued)

a distributor-producer hasn't the right to own a limited number of theatres under certain conditions provided he is not in a monopolistic position or doesn't violate any provisions of the Sherman Act.

Judge Hand: Well, of course, you are in the position where you have. Whether we were right or wrong that was what we so decided and that has been affirmed by the Supreme Court.

Mr. Raftery: Not in any question involved in Section 3. We weren't in Section 3 in the beginning. We weren't in Section 3 after Mr. Justice Douglas' affirmance. We are for the first time now being put into Section 3 by a consent decree. The restraints alleged were in Section 2, both in the original decree entered by your Honors in December, 1946, and in the opinion of Mr. Justice Douglas. And we submit that on this we are being deprived of a very substantial right.

Judge Hand: What have you to say, Mr. Bickford?

Mr. Bickford: I just wanted to answer Mr. Frohlich's argument on Section 8 of this decree, that that section compels competitive bidding. It doesn't at all, and the Government and Paramount are wholly in accord on that. It has nothing whatsoever to do with compulsory competitive bidding which is the thing the Supreme Court [1040] disapproved of in your earlier decree.

Judge Hand: Yes. It is not so. It is a thousand miles from it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Bickford: The words "picture by picture" do not appear in Section 8, and a reading of Section 7, just before it, shows that it contemplates pictures may be sold differently. You may sell a block of pictures. You may sell a lot of pictures together. So that part of his argument that it compels picture by picture by picture sale is not so.

Judge Hand: That is not in this.

Mr. Bickford: That is not in the decree. Of course, block booking is out, too, though another provision in the decree, the same provision that was in your original decree. You can't condition the sale of one copyrighted feature on the sale of another.

Now, so far as the buyer wants more than one picture, he can get it, but that does not compel competitive bidding.

Mr. Frohlich: Well, may I say that I dispute that sharply. That is an issue between us right now because there is nothing in this decree, Judge Hand, which permits, as Mr. Bickford says, the sale or purchase of a group of pictures. This section 8 expressly prevents it. It was slipped in here to broaden the [1041] original block booking against which I argued so strenuously. And furthermore I want to point this out to your Honors: This decree which went up to the United States Supreme Court affected the rights of exhibitors as well as the rights of these defendants. Judge Arnold and Colonel Barton came into this court and sought to intervene.

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Plaintiffs' Exhibit No. 12—(Continued)

They were denied that right. They appealed to the Supreme Court and they argued to the Supreme Court for intervention mainly upon the ground that they did not want competitive bidding in the industry because the great majority of the exhibitors were opposed to it. Now the Supreme Court while it upheld this Court's order did so upon the ground that it had stricken out competitive bidding, and it said in plain English, "Since we have stricken out competitive bidding you don't have to come in and intervene any more; your rights have been protected." The Supreme Court was careful in its discussion of competitive bidding, and I read that carefully again only this morning. I pointed out how exhibitors, especially the great mass of independent exhibitors were harmed and injured by that practice. They felt that they were being put in a very unfavorable economic position by competitive bidding. The Supreme Court said so a half dozen times. Now they are going to be put back in that position by paragraph 8, and I [1042] say that the Attorney General——

Judge Hand: On page 8?

Mr. Frohlich: Page 5, paragraph 8. The Government has no right, it has no authority to defy the Supreme Court as it is doing. Paramount has no right to do it, and I am sure that they are not asking this Court to do the gracious thing when they are asking this Court to put a provision in here in this decree which defies, contradicts and is at variance with the well-considered opinion of the

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Plaintiffs' Exhibit No. 12—(Continued)

Supreme Court. That is what they are doing and they have no right to do it.

Judge Hand: Well, I don't see how 8 has the effect you say it does.

Mr. Frohlich: Well, 8 says that Paramount has to take every picture in every theatre and license it separately and offer it that way; no safeguard as to how it is to be done. It is a clause—I will tell you now: It is not easily understood and I would like to have this Court ask Mr. Wright just what it means because he was asked what it meant and he couldn't tell. Tell him, Mr. Wright.

Mr. Wright: Since this is your Honor's language, I suppose I really ought to pass that back to you, but as I have considered it, this came from the original 1946 opinion. Of course, it now has to be interpreted [1043] in the context of the Supreme Court's opinion and the language means, as I see it, this—first, before I get to that: Mr. Frohlich told you that the provision in the old decree about licensing one or more pictures isn't here. That is not so. Paragraph 7 is in here intact. That is one concerning groups of more than one and certain cancellation privileges allowed. In other words, this decree is identical with the 1946 decree except for 8. 8, as I understand it, is intended to guarantee to the exhibitor the right to compete for the picture, that Paramount distributes each picture on the merits of the particular operation that he has, his theatre and himself as an exhibitor and the kind of picture

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Plaintiffs' Exhibit No. 12—(Continued)

that is being licensed. That is all that the section does. It doesn't compel anyone to bid.

Judge Goddard: Does this prevent them from offering ten pictures at one time?

Mr. Wright: Oh, in a competitive situation, I suppose it is implicit in any scheme of avoiding discrimination between exhibtor A and exhibitor B in seeking the run of a feature. Obviously you can only resolve a contest of that kind in terms of a particular feature that is desired.

Judge Goddard: That is not my question. I am saying there is nothing in this section 8 which would prevent the offering of ten pictures?

Mr. Wright: That is correct.

Judge Goddard: Each one to be considered singly, separate?

Mr. Wright: Quite right. [1044]

Mr. Wright: 10 or 50, the only requirement is that when it comes to determining who shall receive what feature, on what run, that shall be determined upon the——

Judge Goddard: Picture by picture.

Mr. Wright: Picture by picture and theatre by theatre.

Judge Goddard: So, if there were other people in the field, you might get down to determining it picture by picture and the man might have no right to make a trade to buy eight.

Mr. Wright: Yes, conceivably a discrimination might result from saying to one, "Here is an eight

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Plaintiffs' Exhibit No. 12—(Continued)

picture deal," and to the other fellow, "A one picture deal," the fellow who is trying to compete with it.

Judge Hand: We will hear you.

Mr. Schwartz: May it please the Court, I appear for a client named Ball who is the owner of a theatre, only an exhibitor, in Ambridge, Pennsylvania, right outside of Pittsburgh.

My client has a judgment, finally as the result of a mandate of the Court of Appeals for the Third Circuit, against Paramount and some of the other defendants in this case before your Honors. That is a judgment as the result of a private suit to instituted for injunctive relief for violation of the antitrust laws. [1045]

I appear for him today because, in our opinion, our interests are directly affected by this decree in that this decree refers to a theatre in Ambridge, Pennsylvania, which is the subject matter of that particular suit, and that is the State Theatre in Ambridge, Pennsylvania, which appears in the list of theatres contained in the proposed decree at page 27. In order for me to convey to your Honors how our interests are affected, I must perforce refer to the opinion of the Court of Appeals in the Third Circuit, which establishes these facts, implemented by the judgment now entered pursuant to that mandate. The facts are these: my client bought the theatre back in 1944. The theatre had previously been owned 50 per cent by Paramount and 50 per cent by another exhibitor.

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Plaintiffs' Exhibit No. 12—(Continued)

The theatre had been licensed for many years prior to that time for the exhibition of Paramount film and film of the other distributors.

Immediately upon the purchase of the theatre by my client, who purchased the physical building, the operators of the theatre, to wit, Paramount 50 per cent and the other owners 50 per cent, bought a garage down the street and remodeled that into another theatre, right down the street in Asbury.

They shut us down for two years. We could [sic] not get any product. The licenses which we had had up to that time to exhibit the film of those distributors were terminated and the sun was moved right over to the other theatre, newly created as the result of what the Court of Appeals determined to be a conspiracy.

We were able to open up after two years, getting a very small amount of product. Meanwhile the suit we had started went along and, finally, in July of last year, after the decree of this Court and after the disposition of that decree by the Supreme Court, in July of last year, as I say, the Court of Appeals in our circuit gave us a judgment, directed the district court to enter a form of decree, and as say we were entitled to a decree, and leaving the form of it for formulation by the district court. The form of that decree is now pending again in the Court of Appeals on appeal and cross-appeals by all parties, plaintiffs and defendants and today we are here, but we feel duty bound to acquaint

Plaintiffs' Exhibit No. 12—(Continued)

your Honors with the situation because the decree before your Honors today actually tampers with our rights, and we feel, therefore, duty bound to tell your Honors so, for several reasons. First of all, because our own interests are affected; secondly, there may be other exhibitors who, whether they have caught decrees in their favor or not, may still find themselves in the [1047] same position and who may wish to have your Honors' ear but who did not have notice of this proceeding today; and finally, because, unless something is done in the decree before your Honors today with respect to situations such as my client finds himself in, your Honors will, because of sheer unfamiliarity with the facts, not be able to point to a decree which is your Honors' handiwork, and your Honors must accept responsibility therefor.

Therefore, I say to you, in all seriousness, I feel duty bound, not only to my client, but to your Honors to tell you of this situation.

Whether we are permitted to intervene, as Judge Coxe indicated, I think, is of no particular consequence. We are here and your Honors have graciously allowed us to be heard. We have a motion to present, if it is acceptable, for leave to file a printed brief in support of the few remarks I am permitted to say this afternoon. I say, whether that is done by intervention or whether just by graciousness of your Honors is of no particular importance right now. We do feel, however, that your

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Plaintiffs' Exhibit No. 12—(Continued)

Honors should know that here is a situation judicially determined as a final judgment. No certiorari was filed. A petition for rehearing was filed but denied by the Court of Appeals for the Third [1048] Circuit. And we represent, therefore, to your Honors that that is the law of that particular case, and in that case our rights with respect to exhibition in Ambridge, particularly with respect to the State Theatre in Ambridge, a Paramount theatre mentioned in this decree, our rights are directly involved, and that is why I am here before your Honors this afternoon.

Judge Hand: What rights have you been given by that decree?

Mr. Schwartz: The decree as entered, subsequent to the mandate of the Court of Appeals, gave us what we consider inadequate rights. They gave us the right to negotiate. We urged before the district court and are now urging before the Court of Appeals that we are entitled, not only to negotiate, that is, to the right to negotiate for pictures, but that under the facts as there set forth in the Court of Appeals decision, we have a peculiar situation there, we have a situation which falls within the language of the Supreme Court in the Paramount case, in the Schine case, in the Griffith, in the Crescent case, which falls within the language of the Court of Appeals in the Bigelow case in Chicago, to wit, that where there is a conspiracy which has hatched or spawned something, the Supreme Court refers to it as an illegal fruit, that under those

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Plaintiffs' Exhibit No. 12—(Continued)

circumstances, [1049] not only must the conspiracy be stopped, but that the decree must go further and must eliminate the conspiracy root, branch and all its evil fruits.

Now, as a practical matter, we are faced with this situation: we own a theatre in Ambridge; we were shut down by an admitted conspiracy, designed to put us out of business, a conspiracy which spawned or hatched a new theatre right down the street from us. The Court of Appeals said that was illegal, said that was conspiratorial, and gave us a judgment.

Judge Hand: For what?

Mr. Schwartz: The Court of Appeals said——

Judge Hand: To do what?

Mr. Schwartz: The Court of Appeals said we were entitled to a judgment for two things, first, for damages, the amount to be left for determination by the lower court, and, secondly, for injunctive relief, the form of relief to be determined by the district court. That form of relief has not yet been finally determined because, as I say, a decree was entered from which appeals have been taken by all parties, defendants as well as plaintiff.

Judge Hand: Yes, you told me that. What do you suggest?

Mr. Schwartz: We suggest, sir, that that is a [1050] situation which is a fact of this problem before your Honors but which this decree takes no consideration of.

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Plaintiffs' Exhibit No. 12—(Continued)

As a matter of fact, what this decree says is that Paramount may continue to own that very theatre for perhaps three years. This litigation that I speak of started back in 1944.

Judge Hand: Never mind. And then what, if they do own it for three years?

Mr. Schwartz: We will be out of business long before that, and that is exactly what the Court of Appeals pointed out in its opinion, that here was a designed conspiracy to put us out of business. We will be out of business long before then.

Judge Hand: What relief did they give you? They gave you damages?

Mr. Schwartz: They gave us the right to damages, to be determined later. That we haven't yet been able to fix, those damages.

This case that I speak of is typical of any number of cases which are referred to in what is perhaps the most recent pronouncement by the Congress of the United States on this very problem. Perhaps your Honors have not yet had occasion to familiarize yourselves with it. It is the report of the Snell Business Committee, just issued last month, in which this Court's decree and [1051] opinion in the motion picture industry as a whole, and in which the general antitrust laws are discussed, and in that report of the Congress, of that committee of the Congress, there is a reference to the fact that in the case of these individual exhibitors who do not have unlimited funds or resources, even though theoretically

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Plaintiffs' Exhibit No. 12—(Continued)

they may have a remedy under the antitrust laws, practically, that remedy does not exist because by the time they get their remedy, they are bled white, in the language of the report.

We are faced here with a situation where for four years we have litigated——

Judge Hand: I know that. You have said that before. What do you want us to do?

Mr. Schwartz: I suggest, sir, that since this present decree before your Honors is this Court's decree, not a private agreement between parties at all, it is this Court's decree, I suggest to your Honors that before your Honors affix your judicial sanction to that decree, your Honors make provision for cases like Ball, for cases where not only is it necessary for your Honors to stop or break up the conspiracy from this point on, but, in the language of the Supreme Court, to undo the wrongs that have been done.

In our case specifically, and this may apply [1052] to any number of other cases which may be all over the country for all we know, but in our case specifically, to undo the wrong that has been done must necessarily contemplate that that creature of the conspiracy, in the language of the Court, be destroyed; that is to say, if that is not done, then what happens is this: Paramount sells its interest in that theatre to its co-conspirator, another defendant in our case, not a defendant in this case before your Honors, but a defendant in our case, Paramount reaps the result of its conspiracy, it

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Plaintiffs' Exhibit No. 12—(Continued)

gets paid in money for what it has violated the antitrust laws to create, in the language of the Supreme Court, and this co-conspirator in our case continues to own an asset which is the illegal fruit of the judicially determined conspiracy. That is the result of your Honors' signing this decree in its present form. That is why we are here this afternoon, to tell your Honors that.

The least that we could hope to do is ask your Honors to eliminate reference to the State Theatre from this decree. We think your Honors should go further because, as has been pointed out by other counsel, the Attorney General here represents the people, not just an individual private litigant, as I do, he represents the people. Your Honors here have [1053] a mandate from the people to protect their rights, and we say to your Honors that while I am only interested personally in one situation, perhaps your Honors should take means of finding out, through the Attorney General's office or otherwise, about other situations and to make proper provision for them in this decree.

So that we say to your Honors, in the first place, the minimum that we should ask is that any reference to our case or our situation be deleted from this decree. Otherwise we are faced with a danger of Paramount and its co-conspirator coming into our case and saying, "Here is a judicial precedent. You cannot touch us now for three years." We personally are faced with that danger if this decree is signed in its present form.

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Plaintiffs' Exhibit No. 12—(Continued)

We say to your Honors that even if your Honors exclude——

The Court: What do you mean by "cannot touch us for three years"?

Mr. Schwartz: Because, under this decree, Paramount is not required to divest for three years, as to this particular theatre.

Judge Hand: What do you want them to do? Do you want them to divest——

Mr. Schwartz: We most certainly do, sir. [1054]

Judge Hand: Wait a minute. Divest to whom?

Mr. Schwartz: We want them not only to divest but we want them to make restitution, in the language of the Supreme Court in the Schine case, we want them to make equitable restitution for the illegal gains with which they are now possessed, to wit, the ownership of an asset. And the only way we can think of is to close down that theatre, and we are asking the Circuit Court to do that. Whether we will be successful remains for future determination by the Court of Appeals in our circuit but at the moment we are urging that position on the Court which has sustained our right to relief and has not blueprinted the precise form of relief and which, therefore, will have that problem before it.

Judge Hand: Now, Mr. Wright, are you familiar with the situation?

Mr. Wright: Yes, if the Court please, I am familiar with the suit. We have followed it, and I

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Plaintiffs' Exhibit No. 12—(Continued)

might say that this, of course, is only one of a very large number of private litigations that are going on all over the country which inpinge in various ways on this suit.

We have, of course, been conscious of all these various claims and we have been extraordinarily careful not to prejudice any of them in anything that we have [1055] done in this decree.

There is nothing in this decree which prevents Mr. Schwartz or Mr. Hardy from asserting in their respective litigations any rights they may have whatsoever against the defendant here.

There is no provision they can point to, in my judgment, which would have any such effect.

It would be, I suppose, a helpful thing to these litigants if, instead of having to bear the burden of their own litigation, we could, in this suit, take care of and adjust every equity between an injured exhibitor and one of these defendants that exists. Well, when that could be done, I have no idea, of how long it would take, but it isn't possible. There has to be some cut-off between the concept of this, that is, some differentiation between the concept of this suit as one to improve conditions in the industry generally and to help independent exhibitors in general——

Judge Hand: Of course.

Mr. Wright: ——and one which would give specific relief.

Judge Hand: I suppose Paramount would disappear in this reorganization, wouldn't it?

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: The present defendant company.

Judge Hand: Yes. [1056]

Mr. Wright: Well, it will merge as two new companies.

But let us look at this particular situation.

Judge Hand: What rights would he have in this situation? I can imagine what rights he would have, but I would like to have you state them.

Mr. Wright: I should suppose that he has rights in his suit to pursue whatever remedy he has against either Notopoulos, who is the partner. This is a joint situation, an exhibitor named Notopoulos has 50 per cent and Paramount has 50 per cent.

The disposition we made in the decree was to require Paramount to get out. They have three years to do it. They don't have the privilege of acquiring this State Theatre or any of the other theatres in that town of Ambridge, that he is talking about. They do have three years in which to do it.

Judge Hand: He apparently wants them to get out and make some restitution following the claim which he hasn't yet established.

Mr. Wright: His right to restitution is, I suppose, entirely dependent upon the decision of the Pittsburgh District Court and the Third Circuit Court of Appeals, where he is conducting his litigation, and there is nothing in this disposition that has been [1057] made here which could in any way bar him from any restitution or any relief to which he may be entitled in that proceeding.

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Plaintiffs' Exhibit No. 12—(Continued)

And the same thing applies to Mr. Hardy's proceeding and applies to any of these private litigations which are now pending. Their complaint is, as I see it, really not that anything we have done here exactly hampers them from getting the relief they say they deserve, the complaint is, in effect, that we ourselves have affirmatively undertaken to provide it in this suit. That undertaking is just outside the scope of the suit, in the first place. In a situation such as this, Notopoulos isn't even a party. There is no jurisdiction over him whatsoever.

Mr. Schwartz: May I respectfully ask leave of your Honors to submit a brief in printed or typed form, as your Honors determine, documenting some of the things I have said?

Judge Hand: Yes.

Mr. Schwartz: Thank you, sir.

Mr. Bickford: Your Honor, may I just say a word? I think Mr. Wright has correctly set forth the position with respect to this motion by Mr. Schwartz. There is nothing in this decree which can affect his rights in the suit there. [1058]

Now, Mr. Schwartz has, perhaps, inadvertently made a lot of misstatements with respect to that situation. I am not fully familiar with all those facts. I would like to ask your Honors if I could call upon Mr. Caskey, who has been all through that, to answer Mr. Schwartz's contention. I simply say I agree with Mr. Wright, that he has no standing here, that this decree cannot affect his rights in

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Plaintiffs' Exhibit No. 12—(Continued)

the suit, that what he wants he is getting here, we have to get out of town, we have to get rid of the theatre, but he wants you to order the theatre shut for him, and I don't think this Court should be asked to go around shutting theatres.

Judge Hand: What?

Mr. Bickford: He wants you to order the theatre shut, and I don't think this Court should be asked to go around closing theatres.

Mr. Caskey is here.

Mr. Caskey: I really don't know if the Court wants to hear about this litigation in the Third Circuit but the essence of the matter is simply this: Paramount and Notopoulos had a theatre which was in competition with two theatres of Warner's for first run. Plaintiff or his nominee bought the lease, the fee from underneath Paramount, and, so, Paramount and Notopoulos constructed [1059] a better theatre in Ambridge. Then there came the usual controversy about licensing of the pictures first run, and it was the plaintiff's contention that he was entitled to all of the pictures that had theretofore played in the Paramount-Notopoulos theatre.

The case was tried before the district court. Judge Schoonmaker died in the middle of the trial. Judge Gibson took it up. Judgment was for the defendant. The Circuit Court of Appeals reversed. Went back to Judge Gibson for a decree. Judge Gibson entered the decree in the identical form as was entered in the Goldman case, which compelled the defendants

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Plaintiffs' Exhibit No. 12—(Continued)

to offer their pictures on a competitive basis to all-comers.

Plaintiff hasn't been able to survive in the competition, and that is all there is, although they have taken an appeal to the Court of Appeals to try to set aside Judge Gibson's decree following the mandate of the Circuit Court of Appeals, and I assume the matter will be argued down there next month.

Judge Hand: What are they asking for, really?

Mr. Caskey: This is the first I have heard that they were asking to have the theatre closed, but what their complaint is, that in competing with the better Warner theatres and the better new Paramount State Theatre, they aren't able to get the motion pictures [1060] they want at the price they say they should be allowed to pay for them. What the form of their argument in the Circuit Court of Appeals will be, I don't know.

Judge Hand: I don't think we can take your brief on this subject. We will note that you have no standing.

Mr. Schwartz: May I suggest this, that Mr. Wright and Mr. Caskey and the others who spoke have treated this matter before as a private suit. It is true I am here because of private, selfish interest, but I have a right to point out to your Honors that this is not an issue before your Honors now of private litigation. This is a matter of determining——

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The Court: I know, you pointed that out many times, and it is undoubtedly a fact, but we cannot attempt to make provisions for these people who have lawsuits outside. We are not going to do it.

Mr. Schwartz: I thought, in asking permission to submit a brief to your Honors, it would avoid taking the time necessary to call to your Honors' attention, perhaps, language which, as it is read does not particularly register as applicable to our case, but which we consider, in the light of the facts of our case, illustrates the necessity of a court of this nature making provision, not for us as private [1061] litigants, but for the general welfare of the people in a situation of this sort. And here again I refer to the exact language of the Congress in its latest report, a part of which I would like to submit in my brief.

Judge Coxe: What is that, the 80th Congress?

Mr. Schwartz: It is the Second Session, sir, of the 80th Congress. And the language in the report epitomizes our position. It is this, "That the anti-trust laws are of vital importance to our republican form of government in two respects, first"——

Judge Hand: Don't read generously. We don't want to hear any more.

Mr. Schwartz: Well, that is why I asked for leave to submit——

Judge Hand: No, we are not going to receive it.

Mr. Levy: My name is Herman S. Levy. I am general counsel to Theatre Owners of America. I

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Plaintiffs' Exhibit No. 12—(Continued)

was here in 1946 as amicus curiae for the predecessor group. I would like one minute of time, and my attention is directed, naturally, to subsection 8 of paragraph 5, as to which there has already been considerable discussion, and that is, as to whether the language in that subsection decrees compulsory competitive bidding. We are not here saying that the distributor may not use competitive bidding, and legally. [1062] We are opposed to this, or suggest opposition to it, if this means compulsory competitive bidding, which was decreed by this Court, and then discarded by the Supreme Court.

There is, obviously, honest difference of opinion here this afternoon by Mr. Frohlich and Mr. Wright and others. Personally, it is difficult for me to understand how any feature must mean one picture—it doesn't say any feature or features—how any one picture may be licensed theatre by theatre unless it is on a competitive basis.

If Paramount, by Section 8, or the new Paramount, is required to license any feature theatre by theatre, it seems to me it is ipso facto compulsory competitive bidding, and this is part of an injunction restraining Paramount from licensing its pictures any other way, and so we suggest to the Court, in reading this subsection 8, if the Court finds that this language is justification for requiring compulsory competitive bidding only, that a rewording of the language be suggested.

Mr. Russell Hardy: If the Court please, I repre-

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Plaintiffs' Exhibit No. 12—(Continued)

sent a small corporation that leases a theatre in Los Angeles from Paramount Pictures, Inc., and one of its subsidiaries. We ask to intervene in this case to [1063] show that we will be seriously prejudiced and injured by this proposed judgment for two principal reasons which I shall undertake to develop, first, because the proposed judgment contains provisions which will be used in Los Angeles to continue, instead of to dissolve, this restraint of trade and monopoly; and, secondly, because this judgment does not conform to the mandate of the Supreme Court, and, if it did, it would help us, it would relieve us from the restraint of trade and monopoly dealt with in this suit.

Judge Hand: I don't suppose it has to conform. It cannot create new monopolies that are forbidden, I should suppose. That may be what you are aiming at, but this is an adjustment. This is entirely outside of our decree and the Supreme Court decision and Judge Goddard's former orders and setup and everything.

Mr. Hardy: I think that is certainly true. As I have read and studied this judgment, that is certainly true. I think, however, that with respect to an application to intervene, that is of very great importance, the question of whether or not this Court ought not to receive this intervention when a decree is proposed which does not follow the mandate of that Court, and where, if such a decree had been proposed following the mandate of that Court,

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Plaintiffs' Exhibit No. 12—(Continued)

we would have been relieved of these [1064] monopolies, we would have been liberated from the concentration camp of this monopoly in which we have been imprisoned for many years.

Judge Hand: Tell me what it does that you object to.

Mr. Hardy: Well, if I may develop it, I have that in my argument, if I may develop the background and lead up to that, I think it will be much more intelligent.

As I say, this corporation, Partmar, leases a theatre in Los Angeles from Paramount on a lease which expires in 1952. It has but a short three years yet to run. We have been leasing that theatre for 16 years from these people, since 1933, at a time when they were in bankruptcy, and we have been a good and profitable tenant for them.

Eviction proceedings have been brought against us in Los Angeles based upon the former decree of this Court, and they will be supported and strengthened. I fear, if this judgment shall be entered without the changes which I shall suggest.

When we entered into this business in Los Angeles 16 years ago no one could enter into that business, particularly in the first-run business, except at the will of these parties and except at the will particularly [1065] of Paramount. We could not get pictures, no one could get pictures, except upon terms and conditions imposed by them. They had built a Chinese wall around that city and many

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Plaintiffs' Exhibit No. 12—(Continued)

other cities and no one could get in there except at the portal which they guarded and on their terms. I daresay they exercised a control over this business greater than was within the power of the United States Government or any other government in this country.

So we had to submit to their conditions if we entered the business, if we leased that theatre, and those conditions were these: that we use their pictures exclusively, features, newsreels and short subject pictures 52 weeks a year. We did not want that kind of condition. We wanted to have permission to buy pictures where we could. That requirement was not stated in the lease. It was stated in a contract called a franchise, that was contemporaneous with the lease and ran along with the lease and expired with the lease, and we had, during those 16 years, successive leases and successive contemporaneous franchises.

Judge Hand: As I remember it, that was held invalid under our decision.

Mr. Hardy: Yes.

Judge Hand: All right. Now what? [1066]

Mr. Hardy: Those franchises contained a requirement that we buy our pictures exclusively from them, an exclusive dealing requirement; that we charge the admission prices dictated by them. Latterly we persuaded them to liberalize the franchise so that we would have to take their pictures for only 48 weeks a year, but when they gave us

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Plaintiffs' Exhibit No. 12—(Continued)

that great liberty they provided that if we bought anybody else's pictures we should pay them $1050 a week. They never enforced that penalty because, in many instances, they could not furnish pictures for the 52 weeks, but it was there, and if it was legal, it was enforceable, and it was pressure on us always.

The lease contained an option to the lessor to terminate it, as they put it, for any reason whatsoever. One of the reasons was, if a franchise should be cancelled and terminated.

Judge Hand: If it is such a bad lease, why do you object to being dispossessed?

Mr. Hardy: That is the only way a person could be in this business, if it did, in a first-run situation, was subject to their terms and conditions.

We don't object to being dispossessed if we are upon the eve of a condition where we will no longer be subjected to those restraints. What we complain about [1067] is that when this day dawns, when your Honors, this Court and the Supreme Court, have condemned these exclusive dealings and restrictive contracts——

Judge Hand: There is no doubt about that.

Mr. Hardy: Sir?

Judge Hand: There is no doubt about that.

Mr. Hardy: When that day comes, this is a different time, I hope, then we don't want to be evicted, we want to get the few remaining years where we can enjoy non-monopoly and non-restraint of trade, and that is why we object.

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Plaintiffs' Exhibit No. 12—(Continued)

So, as I say, it contained this option to evict us if the franchise should be cancelled for any reason whatsoever on three days' notice.

When this Court entered the judgment prohibiting the performance of franchise, they demanded their theatre, and we refused to give it to them. We took the position that they were wrongdoers, attempting to make use of their own wrongful conduct. They gave us a three days' notice. They brought an eviction proceeding in a court at Los Angeles. In that proceeding they made this fundamental and necessary allegation, that this Court had cancelled the franchise because of illegality and that the lease provided that if the franchise should be cancelled, they should have the option to recover the [1068] theatre, and that illegality and cancellation of the franchise made the option operative and, therefore, they exercised it. Ergo, we are entitled to the theatre. We answered that they were wrongdoers asking a court of equity for relief based upon their own wrongdoing and that they intended to evict us because they were no longer able to enforce those restrictive and monopolistic provisions, and they intended to evict us in order that they might re-establish that or a similar situation and, therefore, defeat the purpose of this judgment, certainly, in spirit and effect.

We have a leasehold interest, therefore, a leasehold estate in this theatre, of which we are to be divested by the use of this judgment and by the force of this judgment, and because this judgment

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Plaintiffs' Exhibit No. 12—(Continued)

has been entered, the intervention rule provides that, as a matter of right, we shall have a right to intervene in such a case.

This Court at this moment is dealing with this property. This divestiture decree and these transfers of property dealt with in this decree are such dispositions as are referred to in the intervention rule.

The judgment of this Court with regard to franchises, which was the basis of the eviction suit in Los Angeles, was reversed by the Supreme Court and [1069] it seemed to me, therefore, that the basis of their lawsuit vanished, but they have persisted in the suit. It is still pending. The Court there has refused to grant us—to dismiss it, and I am very much afraid that when we get back there, particularly after the judgment of this Court, if this Court shall accept this judgment, that we will be evicted, and we will be evicted erroneously. We may be able to take an appeal, we are not rich people, and that may be the end of the story for us. We are being sued for treble damages under the California statute for holding over after their notice of eviction. We may not be able to get a supersedeas bond, and that may be the end of the story for us, and we will be another dead business, destroyed by this monopoly and destroyed by the use of the judgment which these people ask this Court to give them today.

The Supreme Court thought that people in our

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Plaintiffs' Exhibit No. 12—(Continued)

situation had a very important interest, a very important status in this lawsuit. Listen to this melancholy recapitulation of the Supreme Court in that opinion:

"The trade victims of this conspiracy have, in large measure, been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which the defendants have freely [1070] indulged. They have been the victims of the mass purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built."

Now, unless we can get the assistance of this Court, we will simply be added as another victim to those ruins.

When the Supreme Court decided this case, we had renewed hope, particularly in connection with the divestiture features, that we would be saved and that there would be an effectual dissolution entered in this case, that there would be an injunction against enforcing exclusive dealing contracts by any means, by any methods, particularly by eviction of the tenant who had a theatre and bought pictures on that basis.

And one of the things we shall ask this Court, if we are permitted to intervene, is to add to this judgment such an injunction that we shall be permitted to prove what we urge in our proposed complaint.

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Plaintiffs' Exhibit No. 12—(Continued)

The possession, use and transfer and disposition of this theatre, as I have said, are subject to the judgment of this Court, and I am sure there isn't anything that we shall ask that is not within the purview of this judgment. And the proper remedy that ought to be made in this case is in para materia and certainly necessary. [1071]

This theatre, of which we are the lessee, is to be transferred by virtue of this judgment. If this Court may do that at the instance of these parties, certainly it may place appropriate conditions upon the transfer and appropriate limitations upon the transferor and the transferee.

This judgment, as I said, strengthens Paramount in this eviction suit against us, and if they shall succeed, we will be eliminated. We will be eliminated because we have been liberated so that we may compete, so that we may conduct an independent enterprise there.

Certainly it was never intended, certainly it is repugnant to the spirit of any judgment that ought to be entered here, to nip that competition in the bud, and, if it is, this judgment will be used in that case to defeat the purpose and effect of the judgment.

I have no doubt there must be many other similar cases. I venture the belief that Paramount and these other companies haven't leased a theatre to an independent operator except with such an exclusive dealing requirement plus the eviction clause to enforce it. I don't know; the Department

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Plaintiffs' Exhibit No. 12—(Continued)

of Justice probably knows, it ought to know, it has been investigating this situation for, lo, these 30 years or more, and [1072] I venture to say that their files are loaded with such instances.

What do I ask specifically? On pages 4 and 5 of this proposed judgment, paragraphs 7 and 8, which may be referred to as the anti-block booking provisions, which prohibit the sale of one picture conditioned upon another, can be extended. Your Honors can add a few words there to take care of the situation. Block booking is an exclusive dealing practice. I suggest that, in connection with that prohibition, there should be appropriate words to prohibit the enforcement of that by any method, including the eviction of lessees from theatres because it cannot be enforced. [1073]

On page 64 there is a comprehensive provision.

Judge Goddard: What is it you seek? Do you suggest that the penalties be severe?

Mr. Hardy: I am sorry.

Judge Goddard: What do you suggest there? This prohibits——

Mr. Hardy: That prohibits block booking which I say is entirely immaterial, or the same as exclusive dealing, the requirement to buy a company's pictures exclusively. I suggest that there should be added to that a statement to the effect that block booking shall not be enforced by any method including eviction of a tenant because of the inability legally to continue such provision.

Judge Hand: This absolutely prevents any li-

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Plaintiffs' Exhibit No. 12—(Continued)

cense of one feature conditioned upon the licensees taking one or more. It absolutely prohibits that.

Mr. Hardy: Well, take this franchise, it contains the exclusive dealing requirement. Just as soon as that franchise was enjoined they immediately, you see, use the eviction option, and they protest, of course, and say, "We are not evicting you because we can't force you to take our pictures, because we are no longer able to dictate your admission price; we are just evicting you because the franchise has been cancelled [1074] and that is a provision in the lease."

Now if there is anything in inference and belief, because the franchise was cancelled and the franchise is exclusive dealing, that is the only reason why they made the franchise.

As I say, I referred to a provision on page 64 at the bottom of the page, paragraph A. That provides that Paramount shall not be limited in its right to license pictures, or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute in such manner and upon such terms and subject to such conditions as may be satisfactory to it in any theatre in which Paramount Pictures, Inc., has or may acquire pursuant to the terms of this judgment a proprietary interest. That right they are to have for a year or until the completion of this reorganization.

Now that is the most comprehensive right and certainly includes the right to enforce an exclusive dealing contract and to back it up with the eviction

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Plaintiffs' Exhibit No. 12—(Continued)

of a party who refuses to buy all of its pictures from them.

I say that that certainly should be qualified in the manner that I suggested with regard to the other provisions, to prevent the use of that to force an exhibitor to buy pictures exclusively from them or to defeat the anti-block booking provision, and to make it [1075] absolutely certain that this Court does not intend that they shall do that by any method, by eviction or otherwise.

Judge Hand: I don't see how they are doing it by eviction. You don't connect it with block booking.

Judge Goddard: That is the penalty you propose isn't it, eviction?

Mr. Hardy: No. What I propose is that they shall not have the power to evict a tenant, to evict a purchaser of pictures because they are unable to enforce the contract to make him buy all of his pictures from them.

The franchise situation is just the same as the situation in the shoe machinery case where the Shoe Machinery Company leased its shoe manufacturing machines on the condition that the lessee should take machines exclusively from them or buy the materials that are used exclusively from them, and if you didn't buy your machinery exclusively——

Judge Hand: It is like the old Datoyden case. But let us not get into that. We are perfectly familiar with that. What have you got to say to this, Mr. Bickford?

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Bickford: I have quite a lot to say, your Honor. [1076]

The Court: All right. I think we have heard about enough.

Mr. Hardy: If your Honor please, I have another branch to this argument that I would like to develop. I think I can dispose of it in about five minutes.

Judge Hand: All right.

Mr. Hardy: Partmar is prejudiced in perpetuity and more fundamentally by the provisions of this decree with regard to divestiture, first, because this judgment permits a gigantic combination of theatres. This judgment will permit, will create the biggest aggregation of theatres in the world. It will be anywhere from 500 to 600 theatres, now, dependent upon how these parties use certain rights under this decree. It may rise to a thousand or more.

Now that is contrary to the mandate of the Supreme Court. The Supreme Court laid down the principle of divestiture in this case, and that was that where a theatre had been acquired, maintained or used by monopoly or monopolistic methods, it should be divested.

Now this decree does not apply that at all, and because it doesn't apply that, I think we are grossly injured. [1077]

So I think that these theatres dealt with by the judgment of this Court and by the opinion of the Supreme Court can be divided into three classes.

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First, those theatres which were joint interest between defendants, secondly, those which were joint interest between the defendants and independents, and thirdly, what the Supreme Court calls the fruits of monopoly. That third group includes theatres which were acquired, maintained or used by monopolistic methods. This court dealt with the first two categories.

The Government complained because it hadn't dealt with the third category and hadn't divested that category, and they went to the Supreme Court. The Supreme Court sent it back here to deal with that category, to have further proceedings to ascertain what theatres were in that category of fruits of monopoly and to have those theatres divested.

The Supreme Court said this: "To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade they should be divested. Ownership is vulnerable and a suit by the United States under the Sherman Act if the property was acquired or a strategic position maintained as a result of practices which constitute unreasonable restraints of trade"——

Judge Hand: That is what the people [1078] were agreeing to do with the Government.

Mr. Hardy: No, sir, that is precisely what they are not agreeing to do.

Judge Hand: All right. I am afraid they think they are.

Mr. Hardy: I would like to show your Honors

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Plaintiffs' Exhibit No. 12—(Continued)

why I think they are not doing it. They say in this judgment that they are not doing it. On page 2 they say the Paramount defendants have consented to the entry of this judgment after the taking of evidence upon the remand of this cause by the Supreme Court to this court, but without rendition of any decision by this court upon any of the issues and matters which were to be determined upon said remand, without any findings of fact upon such issues, and matters made after said remand and without admission by the Paramount defendants in respect to any issue or matter, and the court having considered the matter, and so forth, and then it goes on with their plan.

I say all it does is to transfer, first get rid of these two categories of joint interest, and it transfers the rest of the theatres to a new theatre corporation, and I say that that new theatre corporation will start with probably 600 and end with a thousand or more theatres. [1079]

The Supreme Court said that that should be done but that this court should ascertain what theatres were the fruits of monopoly over and above the joint interest theatres, and have those divested, and the Department of Justice came back to this court armed with the principle of remedy and it said in October, 1928, in this document filed in this court, the Government's proposed findings and judgment——

Judge Hand: You mean 1948.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: 1948, yes, sir. The Government's proposed findings and judgment with the supporting memorandum, on page 5——

Judge Hand: Well, I have no doubt that they said different things in here. That is unnecessary to a consent decree.

Mr. Hardy: Now they come here and they surrender that. They have given that up. Instead of applying the principle of divestiture pronounced by the Supreme Court, mainly, acquisition, maintenance and use by monopolistic methods they have substituted the principle of negotiation and agreement, and they in effect have sat down with Paramount and negotiated, and they have got up minus what the Supreme Court gave them.

My study of this judgment leads me to believe that they have less in that judgment when—that they [1080] have less in that judgment than they had when they went before this court.

Judge Hand: We can tell you that it is very difficult to tell what the Supreme Court did. They merely passed it back and said, "Do best to us."

Mr. Hardy: They certainly laid down this principle of divestiture based upon acquisition, maintenance and use.

Judge Hand: I think we had better hear the opposition.

Mr. Bickford: I can be very brief, your Honor. I think that many of the things just said to you in this argument should never have been said. It was really what seems to be, and I hate to say it,

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Plaintiffs' Exhibit No. 12—(Continued)

a deliberate effort to mislead you as to what this decree did or intends to do, and as to what the status of these proposed intervenors is. They say they are poor people and if you sign this decree they will be out of business. They are the same ones who tried to intervene here before under the name of the St. Louis Amusement Company. They are a large circuit of 30 or more theatres in St. Louis; one in San Francisco and one in Los Angeles. They have been operating this theatre in Los Angeles and drawing the fat on it since 1933 when they got a lease from Paramount after Paramount went into bankruptcy. Paramount [1081] built the theatre. Paramount owned the building. And all that Paramount is now doing is bringing suit against them out there to get back their property according to the contract which these people made in 1933, and voluntarily renewed from time to time since that period.

There is no question of oppression, and I challenge Mr. Hardy to show you any evidence of any oppression in this situation here, in any of the situations that he referred to that might be found in the files of the Government in Washington.

Judge Hand: What he says is that you wouldn't have done it if you never continue these agreements and franchises.

Mr. Bickford: Now we deny that. We wanted the theatre back and we are bringing suit out there to get the theatre back, and all that Mr. Hardy is trying to do now is to get you to try in some way

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Plaintiffs' Exhibit No. 12—(Continued)

to make some decision here which will give him an advantage in the suit in California where he is faced with a motion for summary judgment at this present time—a motion brought by them and a countermotion by Paramount which is pending before that court and the whole thing will be disposed of there.

Judge Hand: It will probably be denied on the ground that you had to have a full trial with [1082] findings.

Mr. Bickford: Well, simply on the question of law, where the question before you is whether they have a right to intervene, this court has decided and the Supreme Court has supported it by refusal of writs of certiorari in two instances that a person in this situation—in fact, the same person here, has no standing to intervene, and that is the same situation now. So I ask that the motion be denied.

Mr. Hardy: If your Honor please, I accept the challenge of Mr. Bickford to show whether there has been any oppression in this instance. That is precisely what I am asking for. I am asking for the opportunity to prove what we have alleged.

Judge Hand: I don't think you are likely to be allowed to intervene here. Nobody has been yet. There have been a great many representations that people might be affected, and they might be affected. We can't provide for all those outside litigations. There would never be any consent decree or probably if it were to deal with an omnibus decree, there wouldn't be any omnibus decree.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: I don't ask your Honors to do that. You misunderstand me, if you think I do. I ask your Honors to put something in this decree which is appropriate to put in there, namely, to qualify statements in there [1083] saying that may not be used against us. I don't want this court to decide that case out there. I want this court, and I think I have a right to ask this court to make it impossible to use that decree to beat us over the head. I ask this Court to write a decree here which they cannot use as an economic legend on us in some other court, and the qualifications that I ask are appropriate and they certainly ought to be in there.

Mr. Proskauer: Your Honor, may I inquire whether there is any claim here for a general intervention, or does it relate only to this consent decree?

Mr. Hardy: No. I am only interested and I think I have a right only to be interested in the situation at Los Angeles with regard to this particular theatre.

Mr. Proskauer: Do I understand the gentleman to say that he is not asking general intervention which would in any way affect Warner Bros.?

Mr. Hardy: That is right.

Mr. Proskauer: All right. Then I have nothing to say. If you answered the other way, I would have had considerable to say. This gentleman is the one who played the arbitration provisions up to the hilt.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Hardy: Well, is that to be used against me? I hope not, your Honor. [1084]

Mr. Rubin: My name is Robert J. Rubin. I am general counsel for the Society of Independent Motion Picture Producers and I would like to state at the outset that any resemblance between my name and Mr. J. Robert Rubin, my friend, in the language of our business is purely coincidental.

I will take but a very few moments of your Honors' time. It has been a long session.

I do feel that one or two matters should be called to your Honors' attention, and perhaps it will come as a fresh breath of air to indicate that I come not to bury Mr. Wright or the decree entirely but in part to praise a portion of it.

We feel a substantial contribution has been made in so far as the disintegration provisions of the decree are concerned. We feel that the decree which is now in paper form when it is fully implemented will result in increased competition and oftentimes, unfortunately these decrees of divestiture do not, as we know them, always result in increased competition in this phase of the business.

My particular concern, the concern of the producers whom I represent lies in the creation of the new picture company and the numbers of theatres of which that will be composed. [1085]

The Society of Independent Motion Picture Producers is composed of individuals such as Mr. Goldwyn, Mr. Walt Disney, Mr. David O. Selznick, and Mr. Edward Small, and others, who do not own

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Plaintiffs' Exhibit No. 12—(Continued)

theatres but who make possibly two or three pictures a year and sell their pictures picture by picture to the various circuits throughout the country and the various other exhibitors.

This case from the very inception has in my view unfortunately taken on the case of an exhibitor case, a case in which the Attorney General representing the people, and I verily believe that he does that very thing, has been emphasizing constantly both in the evidence and in the argument the necessity for protection of independent exhibitors.

The Society filed an amicus brief before the Supreme Court and before this Court at the time it was before your Honors previously, in which the other side of the coin was presented, and I simply feel that inasmuch as this decree is going to be entered in the context of all of these remarks and in the light of these conversations, lest silence be assent on behalf of the independent producers, it behooves me to make these comments.

The other side of the picture is this: That while disintegration of large theatre holdings, of [1086] theatre circuit, would operate to prevent discrimination against the independent exhibitors, the existence of that self-same power and that self-same integration and concentration operates directly against the independent producers in an even more disastrous fashion.

We have asserted in our brief and we assert now that we have been deprived not of product, as in

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Plaintiffs' Exhibit No. 12—(Continued)

the case of the exhibitor; we don't need the prod-
uct, we produce it; but we have been denied acces
to the screens of the country, and we asserted and
assert that to the extent that concentration of buy-
ing power in these large circuits is diminished, t
that self-same extent, that power to discriminat
against producers and independent producers wh
are supplying products to those circuits, to tha
extent it is lessened.

Our concern lies in this: that this decree brings
into being a new creature, the new picture com-
pany, which starts presumably fresh without the
long history of all the practices which have been
condemned by this and the Supreme Court, starts
with a circuit of approximately 600 theatres more
or less. There are provisions against the new dis-
tributing company requiring them to sell picture
by picture, and I believe that is necessary. It will
make for a more competitive system, which we hope
these proceedings will result in. There is nothing
in the decree restraining [1087] the buying activi-
ties of this new circuit, which is by far larger than
any now existing.

As your Honors know, in the Schine case there
are some 125 theatres which the Government is
vigorously prosecuting and seeking complete dis-
integration of. We have a circuit created of some
600 here, and my concern and our concern is unless
we express ourselves, even though the Court may
or may not modify the provisions of this decree,
that the imprimatur of this Court giving approval

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Plaintiffs' Exhibit No. 12—(Continued)

to this decree will thereby place the stamp of approval upon the creation and existence of circuits of that size. We feel that such concentration of buying power is contrary not only to the provisions of your Honors' decision in this case but specifically the language of the Supreme Court. The independent producers who sell to these circuits are at the mercy of the self-same entities that the independent exhibitors are and who have been in the forefront of this case since its inception.

This case is not over. There are pending litigations possibly on matters to be ultimately decided on the issues of this case. We know there will be interpretations of this decree. We also know that this decree is meaningful only in so far as it is complied with and enforced by the Government. And we feel [1088] that we must express our objections and deplore the creation of a circuit of this size without adequate provision that will compel them to buy pictures individually. This can be accomplished by some generic language that would impose upon them the necessity to buy pictures theatre by theatre without the necessity of relitigating all of these facts. Such a provision would result in compelling them to buy their pictures, whether from affiliates, whether from independent producers distributing to these other major distributing companies, on a fair and competitive basis without combining some 600-odd theatres, which, of course, would result in those practices which

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Plaintiffs' Exhibit No. 12—(Continued)

your Honors have taken cognizance of in this particular case.

Just one further point and I will conclude. Again this is the other side of the coin. The Government apparently in consenting to this judgment has made an effort, and I believe a very substantial effort to open up competitive situations throughout the country.

As I understand it, when this case is completed both as to this defendant and the others, there will be no closed situation. There will be substantial independent first-run exhibition competition. We trust that there will be.

Insofar as the provisions of this decree [1089] with respect to opening up such competition are concerned, your Honors will note the letter that accompanies the decree. And I believe that the provisions of this decree with respect to those theatres enumerated rest upon the representation of Paramount in the attached letter, the significance of which certainly cannot be denied at all. If opinion differs regarding the representation, then we feel the department should come in and make or apply for such modification as is necessary.

The independent producer is concerned not so much with the immediate competitive area of a particular theatre as it relates to another affiliated or an independent exhibitor. Those are arguments that your Honors have heard this afternoon, and that has been the subject of many arguments heretofore.

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Plaintiffs' Exhibit No. 12—(Continued)

We have the additional burden. Our burden, if your Honors please, is to sell those pictures not with respect to the theatre down the street in competition with one across the river. We have to sell our pictures nationally to theatres in all possible situations in this country and we submit that that is a problem that does not beset the independent exhibitor. It besets us because we must use distributing companies to distribute our pictures. The independent exhibitor is concerned with [1090] his immediate competitor. We are concerned with supplying the product to outlets wherever they may exist.

We say that the distinction between the problems besetting the independent exhibitor and ourselves lies in this fact: that here we create a 600-some odd theatre circuit. Exhibit A does not care whether or not there are 649 scattered about the country. All he cares about is the terms afforded to the house he is competing with and that there is no concentration of power directed against him.

We must therefore raise our objection at this time to the creation of such a circuit. I don't know if it will modify your Honor's opinion as to whether or not this decree should be signed or not; probably not; but we feel that the record should be complete. So we state that A, we deplore the creation of such a large circuit. We feel that such a circuit under no circumstances should or must consider itself purged of any of the condemned practices heretofore engaged in. And that such con-

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Plaintiffs' Exhibit No. 12—(Continued)

duct in the future as represented by the buying power, which is created by this decree, should be scrutinized. And B, that in the consideration of this and other matters pending before this Court to their final conclusion the Court should bear in mind, and we feel that we are fully justified in this statement, that this is not at all solely and [1091] exclusively an exhibitor case. It is a case seeking to destroy a monopoly in this industry as a whole, and in so far as independent producers are concerned, we are prejudiced by the concentration of power against the purchase of our pictures in like manner as the independent exhibitor may be prejudiced by reason of the concentration of power with respect to distributors' sale of pictures.

We believe that by their acts ye shall know them, not by the paper or the words written upon it, and that the effectiveness of this decree is not by anything stated in just general terms. This decree I think properly is written in terms smacking of constitutional provisions, because we know that by specific limitation you thereby give license to that which is not included.

We feel that these expressions must be made and made part of the record so that we may again have the opportunity should we feel that the compliance does not conform with what we all hope the desire of the Government is and the desire of this Court is, and we feel the desire of all well wishers of this industry, to instill competition, to come again and call these matters to your Honors' attention.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Proskauer: May I say just a word about that argument, your Honor? I have no [1092] interest in this consent decree controversially, but for this organization to come in after this case is tried and indulge in that kind of talk in the face of the concession of the Government in this record that no producer could ever produce a decent picture who had any trouble in Washington, and in the face of the conceded proof of the continued prosperity of all these independent producers is a suggestion not directed against this consent decree. It is directed to make your Honors forget all that side of this record and the concessions of the Government when it comes to the trial of our case.

Mr. Wright: If your Honors please, I have no desire to make any part of the argument of the case at this time, but since very confusing and inaccurate figures have been thrown at you regarding the decree, I think they ought to be corrected.

The Paramount Circuit as it now exists has about 1,450 theatres in it. The new theatre company may own that exercised all of the conversion rights to convert partly or wholly owned theatres, in the course of dissolving joint ownership, may come out with 650. The size of that company would vary from 400 to 650 theatres.

I would agree that it would be a proper decree if the circuit that emerged were even smaller. However, [1093] as we read the Supreme Court decision dealing with the problem, and we litigated every in-

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Plaintiffs' Exhibit No. 12—(Continued)

dependent circuit case through the Supreme Court in order to get that law established, it deals with the problem in terms of opening up closed towns, rather than in terms of size.

The aim here has been to see that this circuit does have opposition at all critical points so that there are alternative outlets in all locations where it operates, and that in our view is a far more effective means of dealing with the problem of circuit buying than to say in some decree, provide a form of dealing and negotiating licenses.

The whole theory of this decree is that competition can best be introduced into this industry by creating a proper incentive so that it results from the pursuit of normal business incentive. That is true both of the divorcement here and the manner in which the circuit has been dealt with. [1094]

Judge Hand: Mr. Wright, I think speaking for myself at the moment, and I think from what my associates have said, that we are not in favor of allowing intervention here. The thing that has somewhat bothered some of us the prohibition which seems a little unnecessary, namely, we have no control over it in this kind of consent decree. There was objection to that by Mr. Raftery and Mr. Frohlich.

Mr. Wright: Well, I should say on that point——

Judge Hand: You haven't got a couple of wrongdoers there, but they were more or less in the soup if they didn't do it, and they were not

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Plaintiffs' Exhibit No. 12—(Continued)

aggravating the case at all. They haven't got any theatres. Why in the world should there be any provision in the decree which affects their right to buy some of those theatres?

Mr. Wright: Well, if the Court please, in our view it accomplishes this: suppose that we were merely to transfer to another distributor the theatres that now compose the Paramount Circuit: I should suppose that would be the best possible way to invite precisely the same type of discrimination that is occasion for this divorcement. As we see it there is no particular sense in divorcing the circuit from existing picture company in order to give the distributing company normal incentive to sell on a [1095] competitive basis and the circuit to buy on a competitive basis unless you are going to do what you can to safeguard those incentives.

Now transferring of these theatres to another defendant distributor who as a party to the very conspiracy here which has resulted in this lawsuit in our view would be utterly contrary to the purpose we are trying to achieve here of opening up a free market in which any picture company must survive on the basis of the merits of its product and any theatre has to survive on the basis of its merits in serving the public needs for entertainment in the community where it is.

Judge Hand: What about these clauses 7 and 8? 8 you say you took from my decree, but there seems to be some confusion about it.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: Well, the confusion is wholly the result of misstatements that have been made here this afternoon. The fact is that section 7 in this decree is precisely the same as section 7 in the RKO decree and in the 1946 judgment.

Judge Hand: That is all right. There is no doubt that is all right by itself.

Mr. Wright: Yes.

Judge Hand: Now what about 8? [1096]

Mr. Wright: Well, 8 was added to it as I have pointed out in order to comply with the Supreme Court's direction to add an anti-discrimination provision to the affirmed provisions of the judgment dealing with how films should be licensed. That is why that is in there.

Judge Hand: That might be improved. (Examining document.)

Theatre by theatre: what does that mean?

Mr. Wright: Well, I take it that that means that where——

Judge Hand: It doesn't mean that it got to be separately offered?

Mr. Wright: I beg your pardon?

Judge Hand: It doesn't mean that it can't be offered, they can't make an arrangement to take a lot of pictures?

Mr. Wright: Well, what it means I take it is if one exhibitor has 50 theatres and the other exhibitor who wants to run has one, the distributor in awarding the exclusive run to one as against the other considers the offer of the exhibition in the

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Plaintiffs' Exhibit No. 12—(Continued)

one theatre as against what the other exhibitor is offering for exhibition in the theatre immediately in opposition, not on the basis of what he gets from the circuit.

Judge Hand: I guess you have to have [1097] that in order to comply with the non-discrimination phase.

Mr. Wright: I can't see how you can prevent discrimination in any other terms except theatre by theatre.

Judge Hand: The thought is pretty complex when you are considering the right of offering eight pictures. You have got to then find out whether anybody else wants one of them.

Mr. Wright: Well, I don't think it works quite that way. You have continuous cross-dealing. Of course you have people come in and you know what pictures they want, what runs they want in the ordinary conduct of your business.

Judge Goddard: You spoke of 51 theatres. You said 50 and 1. That is the 51 theatres would be put on par? That is all it means, isn't it?

Mr. Wright: 50?

Judge Goddard: 51 theatres. You used the illustration of one owner owning 50 theatres and another owning one theatre.

Mr. Wright: Yes.

Judge Goddard: That means 51 theatres on a par in bidding. [1098]

Mr. Wright: Yes, yes, that there should be. Eliminates any discrimination based on a considera-

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Plaintiffs' Exhibit No. 12—(Continued)

tion of "Here's a man who is offering us a 50-theater deal," and "Here is one who is only offering us a one-theatre deal."

Judge Coxe: It is my understanding, from what you stated before, that this section 8 is not a qualification of Section 7. They both of them stand together.

Mr. Wright: Yes.

Judge Hand: That is undoubtedly so.

Mr. Wright: That clearly is the intention.

Judge Hand: There is a real difficulty in dealing with its application.

Judge Coxe: As long as that is understood, I think that is entirely proper.

Judge Hand: With respect to these motions to intervene, they are denied, after giving the applicants as much opportunity to argue as though they had really been intervenors.

Is there anything else?

Mr. Wright: There is a motion to extend the time of argument from March 30 to April 19, and our time for filing briefs to April 1.

Judge Hand: I thought we had extended [1099] it already.

Mr. Wright: The motion is formally made today. I had spoken to you.

Mr. Proskauer: There is not going to be any objection, if Mr. Wright will state exactly what he wants so we will get it clearly.

Judge Goddard: Was extended to April 19th.

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Plaintiffs' Exhibit No. 12—(Continued)

Mr. Wright: The time for the argument is extended, as I understand it, from March 30 to April 19, and the time for filing our brief is extended from March 1 to April 1.

Mr. Proskauer: So we will have two weeks more.

Mr. Wright: Almost three.

Mr. Proskauer: And, your Honors, I don't want to ask for any ruling; I just lodge a caveat, which I hope I won't have to exercise. I may have to ask your Honors, though, in view of all these changed conditions, to put in some slight testimony in view of what may occur in Mr. Wright's brief. I think I am speaking for all the defendants when I say that, but I don't think it is going to be necessary and I hope it won't.

Mr. Wright: I can assure you there will be nothing in my brief which will be the occasion for further testimony.

Mr. Proskauer: I am pretty sure of that too because I don't think there will be enough in your brief to warrant any further testimony.

Reporter's Certificate attached.

Admitted November 15, 1950.

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PLAINTIFFS' EXHIBIT No. 17

In the
Supreme Court of the United States

No. .....

PARTMAR CORPORATION,
Petitioner,
UNITED STATES OF AMERICA,
Plaintiff,
vs.
PARAMOUNT PICTURES, INC., et al.,
Defendants.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The order of the District Court denying the application for intervention was entered on March 3, 1949. No opinion of the Court was stated or written. Some reasons for which the intervention was denied are indicated here and there in the transcript of the proceedings.

Jurisdiction

Jurisdiction of this Court is based on section 2 of the Expediting Act (United States Code, Title 15, section 29; and 28 U.S.C. 2101).

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Plaintiffs' Exhibit No. 17—(Continued)

Statutes

Rule 24, Federal Rules of Civil Procedure:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In

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Plaintiffs' Exhibit No. 17—(Continued)

exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Statement

In this case the mandate of this Court required the District Court (1) to vacate its judgment of December 31, 1946, as to so-called franchises, i.e., long-term contracts for motion pictures, and to re-examine that subject in the light of the elimination from that judgment of competitive bidding; and (2) to ascertain what, if any, theatres the defendants had acquired or maintained by monopoly methods or used in restraint of trade, and to divest them of such theatres.

Partmar Corporation, the appellant, had a franchise from Paramount Pictures, Inc., which the film company refused to perform after the judgment of December 31, 1946, and ostensibly pursuant to that judgment. Partmar also leased a theatre in Los Angeles from Paramount, in which it used the pictures. On the theory that the injunction against the franchise gave Paramount the right to end the tenancy before the expiration of the term, Paramount is also attempting to evict appellant, so that Paramount may take over the theatre for its own use. Compliance with the mandate as to that one theatre only would have rendered the attempt to evict appellant and the purpose to continue the monopoly use of the theatre futile.

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Plaintiffs' Exhibit No. 17—(Continued

But the mandate was not applied. Instead, Paramount and the plaintiff agreed to a final consent judgment which discarded the principle of divestiture of the mandate, especially in requirements which would have relieved the appellant as an independent exhibitor. Appellant, therefore, sought to intervene and have the District Court receive evidence from it showing that the theatre in Los Angeles had been acquired and maintained by Paramount by monopoly methods, had been used in restraint of trade, and that the termination of the film franchise and the eviction constituted a continuation of those methods. It asked that the judgment should affirmatively prevent retention of that particular theatre and prevent the enforcement of default conditions incidental to an enjoined franchise to divest an independent exhibitor of a leasehold estate in a theatre.

Admitted November 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 389, inclusive, contain the original Complaint; Notice of Motion to Dismiss for Failure to State a Claim Upon Which Relief

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Can Be Granted; Notice of Motion to Strike; Order Denying Motion to Dismiss and Motion to Strike; Answer and Counterclaim of Partmar Corporation, et al.; Motion to Bring in Other Parties and Order Thereon; Amendment to Answer and Counterclaim; Notice of Motion and Motion of Plaintiff to Dismiss; to Strike and for a More Definite Statement or for a Bill of Particulars and Memorandum of Points and Authorities in Support; Amendment to Plaintiff's Motion to Dismiss; Motion to Strike and Memorandum of Points and Authorities in Support Thereof; Stipulation for Appearance of Third Party Defendants; Order on Motions of Plaintiff and Third Party Defendants to Dismiss, to Strike, etc.; Reply to Alleged Counterclaims; Notice of Motion and Motion for Separate Trial on Counterclaims and Memorandum of Points and Authorities in Support Thereof; Order on Motion for Separate Trials, etc.; Notice of Motion for Continuance of Pre-trial and Trial; Notice of Motion for Summary Judgment and Points and Authorities; Statement of Facts on Motion for Summary Judgment; Notice of Cross-Motion for Summary Judgment or in the Alternative to Set for Trial; Order on Motions of Plaintiff and Defendants for Summary Judgment, etc.; Stipulation and Order re Amendment to Counterclaim; Trial Memorandum of Points and Authorities; Brief for Defendants; Notice to Take Depositions; Notice of Motion and Motion for Order Delaying Taking of Deposition; Memorandum of Opinion; Findings of Fact and Conclusions of Law; Judgment; No-

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tice of Appeal; Designation of Contents of Record on Appeal; Designation of Record; Supplemental Designation of Record; Stipulation and Order Extending Time to Docket Appeal; Demand for Statement of Points by Appellant; and Third Party Defendants' Statement of Additional Items to Be Included in the Complete Record, and a full, true and correct copy of minute order entered May 7, 1951, which, together with the original exhibits and copy of reporter's transcript of proceedings on June 11, Sept. 8, 15 and 16, 1947; January 26, Apr. 26, and June 7, 1948; March 15, June 2, 1949; January 23, 30, Apr. 17, 24, November 8, 9, 10, 14, 15, 16, 17, December 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, and 21, 1950; June 4 and 18, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fee for preparing and certifying the foregoing record amounts to $3.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 17th day of September, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

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[Endorsed]: No. 13113. United States Court of Appeals for the Ninth Circuit. Partmar Corporation and Fanchon & Marco, Inc., Appellants, vs. Paramount Pictures Theatres Corporation and Paramount Pictures, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13113

PARTMAR CORPORATION, et al.,
Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, et al.,
Appellees.

APPELLANTS' STATEMENT OF POINTS RELIED UPON ON APPEAL

To Paul P. O'Brien, Clerk of the United States Court of Appeals for the Ninth Circuit:

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The appellants intend to rely on the following points on appeal:

1. No issue of conspiracy in restraint of interstate trade arose as an issue upon the complaint, and conspiracy was not specified on the motion for summary judgment or at the trial as making the franchise unlawful.

2. Substantial evidence of conspiracy was excluded at the trial, and the exclusion would have been prejudicial error had the trial applied to the counterclaims.

3. The finding in the eviction suit that the franchise was lawful on the evidence in that case is perfectly consistent with the existence of the conspiracy in restraint of interstate trade in motion pictures alleged in the counterclaims.

4. Dismissal of the treble damage claims without trial deprives the appellants of due process of law and other constitutional rights.

Dated October 2, 1951.

MacFARLANE, SCHAEFER & HAUN,
HENRY SCHAEFER, JR.,
WILLIAM P. GAMBLE,
JAMES H. ARTHUR,
By /s/ WILLIAM GAMBLE,
Attorneys for Appellants.

RUSSELL HARDY,
Of Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 4, 1951.

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No. 13113

United States
Court of Appeals
For the Ninth Circuit

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday, October 1, 1952.

Before: Stephens, Bone and Pope,
Circuit Judges

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Russell Hardy, counsel for the appellants, and by Mr. Rodney K. Potter, counsel for appellees, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, December 16, 1952.

Before: Stephens, Bone and Pope,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten per curiam opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

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United States Court of Appeals
for the Ninth Circuit

No. 13,113

PARTMAR CORPORATION and FANCHON & MARCO, INC.,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division

Before: Stephens, Bone and Pope,
Circuit Judges

PER CURIAM

The Honorable Harry C. Westover, United States District Judge, has thoroughly discussed the issues of the above-entitled case in an opinion printed in 97 Fed. Supp. 552, and we affirm the judgment for the reasons given therein.

Affirmed.

[Endorsed]: Per Curiam Opinion. Filed Dec. 16, 1952. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

No. 13,113

PARTMAR CORPORATION and FANCHON & MARCO,

Appellants,

vs.

PARAMOUNT PICTURES THEATRES CORPORATION and PARAMOUNT PICTURES, INC.,

Appellees.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellees recover against the appellant for their costs herein expended and have execution therefor.

Filed and entered December 16, 1952.

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United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 433 pages, numbered from and including 1 to and including 433, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 641

PARTMAR CORPORATION and FANCHON AND MARCO, INC., Petitioners

vs.

PARAMOUNT PICTURES THEATRES CORPORATION, et al.

ORDER ALLOWING CERTIORARI—Filed May 25, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to the issue of dismissal of the counterclaims.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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